

Case No. 43620-5-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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RUBY JUMAMIL

Appellant

vs.

NOEL COON and DOUG WEST,

Respondents

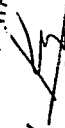
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REVISED BRIEF OF RESPONDENT DOUG WEST

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## TABLE OF CONTENTS

I. Case Summary.....	1
II. Statement of Facts .....	3
1. Appellant Ruby Jumamil.....	3
2. Respondent Douglas West.....	4
3. Poker at Freddie's.....	5
4. Dealer Support.....	7
5. Work Schedule .....	8
6. Dealer Vote for Dealer Support Tracking .....	9
7. Orders Granting Summary Judgment Are Reviewed De Novo .....	19
8. Arguments Or Evidence Raised After The Summary Judgment Order Should Be Stricken And/Or Disregarded .....	20
a. The Court Should Either Strike Or Disregard Facts Or Assertions Not Part Of The February 24, 2012 Summary Judgment Motion.....	22
9. No Improper Wage Rebating Occurred – Even If It Did, West Is Not Personally Liable.....	24
10. West Is Not An Employer, Officer, Vice-Principal, Or Agent Of Lakeside, LLC And Had No Control Over Payment, Or Non-Payment, Of Wages .....	26
11. Jumamil's Reliance On The Case Of <i>Dickens v.</i> <i>Alliance Analytical Laboratories, LLC</i> Is Entirely Misplaced When The <i>Dickens</i> Court Specifically Declined To Determine What Level Of Management	

Authority And What Willful And Intentional Actions Are Necessary To Create Personal Liability Under The Wage Claim Statutes .....	28
12. Jumamil Failed To Establish Any Question Of Material Fact That West Had Ever Received A Rebate Of Her Wages .....	31
13. This Court May Affirm The Trial Court’s Decision On Any Grounds, Including That No Rebating Of Wages Occurred Under The Undisputed Facts .....	33
14. Even If Jumamil’s Minimal Dealer Support Amounted To A Rebate Of Wages, It Was Not Willful On The Part Of West, And Jumamil Knowingly Submitted Thus Cannot Recover Under RCW 49.52.070 .....	38
a. Damages Under RCW 49.52.070 Are Only Available For Willful Wage Rebating And Withholding .....	38
b. Jumamil Knowingly Submitted To Any Minimal Wage Rebating Or Withholding .....	39
15. Jumamil’s Claims Are Moot As She Has Already Been Paid The Very Same Wage Claim Damages She Continues To Assert Against West In This Appeal .....	40
16. A Plaintiff Cannot Recover The Same Damages From Multiple Defendants In Multiple Lawsuits .....	44
17. Newton Did Not “Settle” Or Get “Released” From Jumamil’s Wage Claims – He Paid Them .....	47
18. Once Jumamil Accepted Payment of Her Wages, There Is No Controversy To Decide On Appeal .....	48
19. Once Jumamil Accepted Payment of the Disputed Wages and Damages, There Is A Bona Fide Dispute Over Further Obligations To Pay .....	49

20. Attorney Fees.....	49
III. Conclusion.....	50
IV. Exhibits	
1. Declaration of Michael E. McAleenan Supplemental Record on Appeal with additional evidence per Commissioner Schmidt’s January 9, 2013 Order granting Respondents’ motion in part	

## TABLE OF AUTHORITIES

### TABLE OF CASES

<i>Amend v. Bell</i> , 89 Wn.2d 124, 570 P.2d 138 (1977).....	20
<i>Beaupre v. Pierce County</i> , 161 Wn.2d 568, 166 P.3d 712 (2007) .....	22
<i>Byrne v. Courtney Ford, Inc.</i> , 108 Wn. App. 683, 32 P.3d 307 (2001) .....	32, 33
<i>Cameron v. Neon Sky, Inc.</i> , 41 Wn. App. 219, 703 P.2d 315, rev. denied, 104 Wn.2d 1026 (1985) .....	49
<i>Chelan County Deputy Sheriffs' Ass'n v. County of Chelan</i> , 109 Wn.2d 282, 745 P.2d 1 (1987).....	38
<i>Dickens v. Alliance Analytical Laboratories, LLC</i> , 127 Wn. App. 433, 111 P.3d 889 (2005) .....	28-30
<i>Douglas v. Jepson</i> , 88 Wn. App. 342, 945 P.2d 244 (1997) .....	21
<i>Ellerman v. Centerpoint Prepress, Inc.</i> , 143 Wn.2d 514, 22 P.2d 795 (2001).....	25-30, 33, 39
<i>Engstrom v. Goodman</i> , 166 Wn. App. 905, 271 P.3d 959 (2012) .....	22
<i>Ensley v. Pitcher</i> , 152 Wn. App. 891, 222 P.3d 99 (2009) .....	45
<i>Hodge v. Raab</i> , 151 Wn.2d 351, 88 P.3d 959 (2004) .....	20, 21
<i>Hoff v. Mountain Const., Inc.</i> , 124 Wn. App. 538, 102 P.3d 816 (2004) .....	20
<i>Hough v. Stockbridge</i> , 113 Wn. App. 532, 54 P.3d 192 (2002), rev'd in part on other grounds, 150 Wn.2d 234, 76 P.3d 216 (2003).....	40-41

<i>Howell v. Blood Bank</i> , 117 Wn.2d 619 .....	20
<i>In re Marriage of Horner</i> , 151 Wn.2d 884, 93 P.3d 124 (2004) .....	41
<i>Kuhlman v. Thomas</i> , 78 Wn. App. 115, 897 P.2d 365 (1995) .....	45, 46
<i>LaCoursiere v. CamWest Development, Inc.</i> _____ Wn.App _____, _____ P.3d _____, 2012 WL 5992101 pg. 5 (Dec. 3, 2012 Div. I).....	25, 33, 39
<i>Lillig v. Becton-Dickinson</i> , 105 Wn.2d 653, 717 P.2d 1371 (1986) .....	38, 49
<i>McDonald v. Wockner</i> , 44 Wn.2d 261, 267 P.2d 97 (1954).....	34
<i>Morgan v. Kingen</i> , 141 Wn. App. 143, 157 P.3d 487 (2007), affirmed 166 Wn.2d 526 (2009) .....	27, 28
<i>Peterson v. Kitsap Community</i> , _____ Wn. App. _____, 287 P.3d 27, 33 (Div. II, October 23, 2012) .....	19
<i>Pope v. Univ. of Wash.</i> , 121 Wn.2d 479, 852 P.2d 1055 (1994) .....	3, 38, 39
<i>Seven Gables Corp. v. MGM/UA Entm't Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	20
<i>Shilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998) .....	44
<i>State v. Carter</i> , 18 Wn.2d 590, 142 P.2d 403 (1943)....	3, 24, 32, 34-38, 40
<i>State v. Marohl</i> , 170 Wn.2d 691, 246 P.3d 177(2010) .....	33
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	48, 49
<i>Wash. Fed'n of State Employees v. Office of Financial Management</i> , 121 Wn.2d 152, 849 P.2d 1201 (1993).....	21

<i>Yates v. State Board for Community College Education</i> , 54 Wn. App. 170, 773 P.2d 89, rev. denied (1989) .....	43, 44
-------------------------------------------------------------------------------------------------------------------------	--------

## **STATUTES**

<i>RCW 49.52.050</i> .....	3, 16, 24, 33, 34, 38, 39, 44, 49
<i>RCW 49.52.070</i> .....	16, 25, 29, 38, 39, 44, 49

## **OTHER AUTHORITIES**

<i>14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.33, at 479 (1st ed.2007)</i> .....	45
<i>Webster's Third New International Dictionary p. 1892 (1993)</i> .....	34
<i>RAP 9.10</i> .....	22
<i>RAP 9.12</i> .....	21
<i>CR 56</i> .....	19, 20

## I. CASE SUMMARY

Appellant Ruby Jumamil's ("Jumamil") appeal is a thinly veiled effort to hold Respondents Doug West ("West") and Noel Coon ("Coon") responsible for a jury verdict even though they were previously dismissed from the case and the vast majority of the jury's verdict<sup>1</sup> was for claims that were never made against Respondents. This appeal, however, is limited to whether Jumamil's minimum wage and rebating claims against West and Coon individually were properly dismissed on summary judgment and whether Jumamil's appeal is now moot because she accepted payment of the wages she claims due in this case from another Defendant in a subsequent lawsuit.

Jumamil, an at-will employee at Lakeside Casino, LLC d/b/a Freddie's Club Casino in Fife ("Lakeside, LLC" or "Freddie's")<sup>2</sup>, was terminated August 17, 2010, for excessive dealer mistakes and poor hand speed. Jumamil was warned of these issues in the past, admitted she made too many mistakes during her exit interview, and admitted in her Unemployment Insurance ("UI") application that she was terminated for

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<sup>1</sup> The jury awarded Jumamil \$288.99 for her minimum wage claims, and \$811.20 for her rebating claims against Lakeside Casino, LLC only. See McAleenan Declaration attached as Exhibit 1 and CP 648-649, pursuant to Commissioner Schmidt's January 9, 2013 Order partially granting Respondent's motion to supplement record on appeal.

<sup>2</sup> At the time of hearing the Motion for Summary Judgment, Jumamil's claimed unpaid wages totaled approximately \$278.00. CP 86, 124-125.

“failure to meet performance” and “not dealing fast enough.” After being awarded UI, Jumamil changed her story and made claims against Freddie’s, alleging for the first time, that she was fired because she refused to provide Dealer Support<sup>3</sup> and that Dealer Support was required to work at Freddie’s. Jumamil also claimed, for the first time, that floor supervisor West failed to pay her minimum wage and rebated her wages.

Jumamil also asserted these same wage and rebating claims most recently in a new separate lawsuit against Freddie’s General Manager, Jack Newton (“Newton”). See Exhibit 1, CP 641-644.

In West’s Motion for Summary Judgment, West set forth specific un rebutted facts establishing he was 1) one of many low level supervisors at Freddie’s; 2) not a member, officer or manager of Lakeside, LLC; 3) did not share in the profits of Freddie’s; 4) neither collected nor received<sup>4</sup> any monies from Jumamil or any other poker dealers; 5) did not control or otherwise supervise payroll or wages; 6) followed direction from, and

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<sup>3</sup> **Dealer Support:** Given that the vast majority of a poker dealer’s earnings are comprised of tips, if a dealer is not dealing, he or she is merely earning minimum wage. Therefore, as Jumamil herself acknowledged, it is common in the industry for dealers who are not dealing to sit at a poker table and play in order to support the other dealers to keep games going. This is known as “Dealer Support.” Otherwise, in the event that the number of players at a table dwindled to less than 4-5, the game would likely break and the dealer could not earn tips. Jumamil acknowledged she both provided and received Dealer Support and earned more in tips as a result. Dealers could also earn minimum wage from Freddie’s if they remained on the clock while providing Dealer Support. This was usually done on a dealer’s paid thirty (30) minute break before or after dealing for thirty (30) minutes. Many dealers, however, chose not to remain on the clock while playing to remain eligible for the player jackpots.

reported to, three (3) higher supervisors and managers at Freddie's; and 7) had no authority to bind Lakeside, LLC. Nowhere in Appellant's brief does she argue or establish questions of material fact on these issues.

Instead, Jumamil argues that Washington's wage rebating, or "anti-kickback" statute, RCW 49.52.050, should be construed to provide for liability without proof of culpability – in essence strict liability – without actual collection or receipt of an employee's wages. This argument is unsupported by the statutes and was flatly rejected by our Supreme Court. *See, Pope v. Univ. of Wash.*, 121 Wn.2d 479, 491 n.4, 852 P.2d 1055 (1994) (The ... argument that RCW 49.52.050 establishes liability without fault is not persuasive. . . .Affirmative evidence of intent to deprive an employee of wages, however, is necessary to establish liability under RCW 49.52.050"); *See, State v. Carter*, 18 Wn.2d 590, 142 P.2d 403 (1943) (without evidence of actual wages being received or collected, no personal liability attaches).

## **II. STATEMENT OF FACTS**

### **1. Appellant Ruby Jumamil:**

Jumamil is a 29 year old former Freddie's poker dealer who was hired in November 2006, as an at-will employee. CP 414; Doug West

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<sup>4</sup> Other than a customary token tip.

Declaration<sup>5</sup> ¶ 3. Jumamil earned the then minimum wage of \$8.55 per hour, plus tips. *Id.* Tips are a poker dealer's primary source of income. *Id.* Tips can average \$150.00 to \$400.00 per night (approx. \$42.00 per hour). CP 414, 451-452; McAleenan Dec. ex. 1 - Jumamil deposition transcript excerpts<sup>6</sup> p. 67, ln. 17 to p. 68, ln. 18.

**2. Respondent Douglas West:**

West has worked in the casino industry since 1999 and at Freddie's since 2005. CP 413; West ¶ 2. West is one of four (4) full time floor supervisors<sup>7</sup> for Freddie's poker room. CP 421; ¶ 24. He is neither a member, manager, nor officer of the LLC. CP 420; ¶ 22. West's supervisor is Ben Hoang ("Hoang"), the casino manager. *Id.* Next in the chain of command is the casino manager, Roger Hobson ("Hobson"), and then the general manager, Newton. *Id.* West neither shares in the profits of the LLC nor has any say or control in the operation of the LLC. *Id.* West has no authority over payroll matters both in general and with regard to Jumamil's claims, and has no payroll, check writing, or cashing authority. *Id.* While West may make recommendations as to hiring or firing, he has no authority to do so without authorization and direction from his

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<sup>5</sup> Refers to Doug West's Declaration filed in support of his Motion for Partial Summary Judgment and shall be hereafter referred to as "West."

<sup>6</sup> Plaintiff's deposition transcript excerpts are attached to the Declaration of Michael E. McAleenan filed in support of West's Motion for Partial Summary Judgment as Exhibit 1 and will be hereafter referred to as "Jumamil."

superiors. CP 421; *Id.* He certainly had no authority to pay, or not pay, an employee, and never withheld, received, nor collected any of Jumamil's wages. *Id.*

As a floor supervisor, West's duties were limited to opening and closing card games, selling chips, greeting and seating players, organizing schedules, resolving disputes among employees and/or customers, evaluating dealer performance, and otherwise generally supervising the evening shift poker operations. *Id.* ¶ 23. Out of the approximately thirty-two (32) hours Jumamil claimed she was not paid for doing Dealer Support, West was the poker supervisor on only five (5) occasions totaling 8.25 hours. *Id.* ¶ 25. Of the amounts Jumamil claims in rebated wages, there is no evidence or testimony that West received or collected any of it, or how much.

### **3. Poker at Freddie's:**

Poker Dealers<sup>8</sup> ("Dealer") at Freddie's typically only deal "Texas Holdem." CP 414; ¶ 4. In "Texas Holdem," players compete against each other, rather than against the casino. *Id.* The casino cannot win or lose a

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<sup>7</sup>Many individuals acted as floor supervisors during the Dealer Support tracking period, including West, Hoang, and Daniel Carruthers. CP 413, 606, 181.

<sup>8</sup>At Freddie's, poker dealers are differentiated from other card game dealers. For example, a poker dealer does not deal Black Jack, etc., and the poker room, vis-à-vis the table game room, is treated as a different department. Also, the table game dealers "pool" their tips together for equal distribution among all table game dealers at the end of the day; whereas poker dealers keep their individual tips. CP 28-29, 414.

game – only the players can win or lose. The casino also cannot win or keep the pot. *Id.* Instead, the casino earns a maximum of \$3.00 for each game played, which is known in the gaming industry as the “rake.” *Id.* When total bets wagered in a game reach \$10.00, the Dealer takes \$1.00 out for the casino’s share or “rake.” *Id.* When total bets wagered reach \$20.00, the Dealer takes out an additional \$1.00. *Id.* When total bets wagered reach \$30.00, the Dealer takes out a final \$1.00, making a \$3.00 total for the casino for that game. *Id.* Even if the total bets continue to increase, the casino does not earn more than the \$3.00 already taken out by the Dealer.<sup>9</sup> *Id.* The game concludes when there is only one player remaining, or after the highest poker hand takes all of the bets wagered. *Id.*

Because Freddie’s makes only a maximum of \$3.00 per game of poker played (or \$3.20 if the administrative fee for administering the jackpot funds is included), it is important for the Dealers to deal quickly and accurately. CP 415; West ¶ 6. Dealers are expected to minimize dealing errors as those errors frustrate and offend customers. *Id.* They can also cost the customers winnings. *Id.* Dealer mistakes also decrease the number of games that can be dealt in a given time frame. *Id.* At Freddie’s,

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<sup>9</sup> In addition to the \$3.00 maximum the casino earns per game, Dealers also take out a maximum of \$2.00 per game for a “player-supported jackpot” that is paid to a player when they get a very difficult-to-achieve hand, such as a “Royal Flush” or “four-of-a-kind.” CP 414; *Id.* ¶ 5. Freddie’s receives a 10% (\$0.20) administrative fee out of each \$2.00 per game allocated to the jackpot. *Id.*

Dealers are expected to deal at least seventeen (17) games per half hour. CP 459, 462; Jumamil dep. p. 97, ln. 1-13, 18-25, p. 122, ln. 8-16. This is known as “Hands Per Down,” “HPD,” or “Hand Speed.” CP 415; West ¶ 6. This minimum standard was known to Jumamil. *Id.* A Dealer’s HPD is tracked as part of his or her evaluations. CP 415, 484-485; *Id.* p. 319, ln. 20 to p. 320, ln. 19.

**4. Dealer Support:**

Given that the vast majority of a Dealer’s earnings are comprised of tips, if a Dealer is not dealing, he or she is merely earning minimum wage. CP 415; West ¶ 7; CP 28<sup>10</sup> ¶ 3. Therefore, as Jumamil acknowledged, it is common in the industry for Dealers who are off shift, or who are on a break, to sit at a poker table and gamble with their own money in order to support the other Dealers to keep games going. CP 470-471; Jumamil p. 218, ln. 8-11; p. 219, ln. 1-3; CP 28 ¶ 3. Otherwise, in the event that the number of players at a table dwindled to less than four (4) or five (5), the game would likely break and the Dealer could not earn tips. CP 454; Jumamil p. 76, ln. 20-25. Prior to the relevant time frame when Jumamil alleges her claims in this case arose, Jumamil acknowledges that

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<sup>10</sup> Various Dealers submitted Declarations concerning their employment at Freddie’s and Dealer Support. Many of the Declarations contain similar information, thus will be identified as “Dealer Declarations” unless an individual Dealer’s Declaration is otherwise specifically identified.

she both provided and received Dealer Support and earned more in tips as a result. CP 455; Jumamil p. 77, lns. 1-17. Dealers could also earn minimum wage from Freddie's if they remained on the clock while providing Dealer Support. CP 415; West ¶ 7. This was usually done on a Dealer's paid thirty (30) minute break before or after dealing for thirty (30) minutes. *Id.* Many Dealers chose not to remain on the clock while playing to remain eligible for the player jackpots.<sup>11</sup> *Id.*

**5. Work Schedule:**

At Freddie's, the days upon which a Dealer works and the particular shift a Dealer works is generally determined by date of hire seniority. CP 416; West ¶ 8.

In 2007, Freddie's expanded its poker room and hired more Dealers. *Id.* ¶ 9. In 2007/2008, Jumamil was assigned to what she considered to be the busiest times and best days to work – the 7:00 p.m. shifts on Friday, Saturday, Monday and Tuesday. CP 467-469; Jumamil p. 213, ln. 21 to p. 215, ln. 4. Jumamil's preferred schedule did not change from 2007 through the date of her termination in August 2010. CP 463-464; *Id.* pp. 182-183.

Freddie's did its best to schedule only the number of Dealers it

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<sup>11</sup> If a Dealer remained on the clock while providing Dealer Support and won a player-funded special jackpot referred to previously, the Dealer could not keep it but would instead need to share it with the other players at the table. CP 415; West ¶ 7.

expected to use on each shift. CP 416; West ¶ 10. However, if the casino was slow and there were not enough games to deal, Dealers could be sent home. *Id.* The procedure for determining which Dealers were sent home has changed over the years. *Id.* Initially, it was based solely on date of hire – in other words, it was based on seniority, regardless of the level of a Dealer’s skills, hand speed, or accuracy. *Id.* In early 2010, the poker room management began an effort to improve the quality of the poker room. *Id.* Some new Dealers were hired. *Id.* However, the newly hired Dealers complained that they would be the first to be sent home when the casino got slow, even if they were more skilled than the other Dealers who had worked at Freddie’s longer. *Id.* In an effort to retain newly hired employees, the procedure for determining which Dealers would be sent home when the casino got slow was changed to a rotating system. *Id.* After numerous complaints from Dealers about a lack of work and no merit based system, the procedure again changed in June of 2010 to a hybrid system comprised of seniority and Dealer Support. *Id.* Dealers believed that those providing Dealer Support should get consideration in deciding which Dealer was to be sent home if the casino was slow. *Id.*

**6. Dealer Vote for Dealer Support Tracking:**

After a majority vote of the Dealers in support of the change, Freddie’s implemented a new hybrid system for sending Dealers home if

the casino was slow. CP 29 ¶ 4. Dealers who provided Dealer Support to their fellow Dealers for six (6) hours or more per week would retain their seniority when someone needed to be sent home when the casino slowed down. *Id.* This system was voted on by the approximate thirty (30) Dealers at Freddie's and it passed by a clear majority.<sup>12</sup> CP 453; *Id.* ¶5; Jumamil p. 73, ln. 3-5. Jumamil does not recall anyone at the meeting voicing an objection to the policy. CP 483; Jumamil p. 316, ln. 8-10.

Freddie's upper management anticipated Dealers could easily accomplish the six (6) hours per week of Dealer Support during their paid thirty (30) minute breaks<sup>13</sup> (and also earn minimum wage). CP 416-417; West ¶ 11. Dealers were free to provide Dealer Support at other times too, including before and after their shifts.<sup>14</sup> *Id.* There were no requirements on how a Dealer would provide Dealer Support – they could bet, or not; they could take limited breaks when the blinds came; and/or Dealers could certainly choose not to play at all. *Id.* Again, the main purpose of Dealer Support was to fill a seat to keep the games going. *Id.*

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<sup>12</sup> While witness recollection of the vote percentage ranges from a clear majority to 75%-90%, the overriding point is that it was clear more Dealers wanted it than did not. Many witnesses recall Plaintiff voting for it. Other witnesses certainly do not recall Plaintiff voting against it. CP 29 ¶¶ 4-5.

<sup>13</sup> Dealers typically deal for thirty (30) minutes and then break for thirty (30) minutes. The breaks are paid at minimum wage, as is the time the dealer is not on her break. CP 416-417; West ¶ 11.

<sup>14</sup> While there was a dispute between the parties about whether Dealer Support could be provided before or after a Dealer's shift, the resolution of such is not relevant or material.

It is important to note that Dealers were not required to gamble or provide Dealer Support. CP 417; *Id.* ¶ 12; CP 29 ¶ 6. Instead, if a Dealer chose to provide Dealer Support to their fellow Dealers, their support, along with seniority, would be considered in deciding who went home when the casino got slow. CP 417; West ¶ 12; CP 29 ¶¶ 4-7. Dealer Support did not affect an employee's scheduled work days or shift preference. *Id.* Indeed, Jumamil's preferred work schedule of 7:00 pm on Monday, Tuesday, Friday and Saturday<sup>15</sup> remained unchanged even after she stopped providing Dealer Support. CP 463-464, 468-469; Jumamil pp. 182-183, 214-215. Instead, Dealer Support only affected a Dealer's work hours in the event there was not enough work. CP 417; West ¶ 12.

Per the vote by the Dealers, beginning in May 2010, Freddie's began tracking Dealer Support hours. CP 418 ¶ 13; CP 29 ¶¶ 4-5; West ¶ 13. Freddie's did its best to employ the necessary amount of Dealers for a given shift. CP 414; West ¶ 13. Dealer Support was only tracked for purposes of who would go home early if the casino was slow, if other Dealers did not want to go home or play, and if other Dealers did their Dealer Support. *Id.* If all those scenarios aligned, and a Dealer had the lowest seniority, that Dealer would go home first. *Id.* In other words, it did

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<sup>15</sup> Jumamil believes this schedule and start time is the best because it is soon after customers get off work and is the busiest. CP 468-469; Jumamil pp. 214-215, ln. 15.

not happen often and it was a minor issue in daily casino operations. *Id.*

Jumamil maintained six (6) hours of Dealer Support for less than three (3) weeks. CP 418; West ¶ 13. As a result, from May 3 through August 17, Jumamil claims she was sent home only three (3) to four (4) times before less senior Dealers due to Dealer Support. CP 461; Jumamil p. 109, lns. 12-19. Jumamil cannot, however, identify what days or dates this occurred. *Id.* Regardless, even if Jumamil was sent home early those three (3) to four (4) times, it did not alter the 2010 average number of hours she worked as she maintained her forty-nine (49) hours worked per pay period. CP 487-488; McAleenan Dec. ex. 5. Of note, it was a common practice for Jumamil to request an “early out” or “EO,” meaning that she requested to be let off work early if possible. CP 460-461, 418; *Id.* p. 108, ln. 21 to p. 109, ln. 11; West ¶13.

In early 2010, Freddie’s management made a concentrated push to improve the quality of its poker room, which included additional employee reviews and efforts to find better and faster dealers. CP 418; West ¶ 14. Jumamil’s history with Freddie’s was checkered with dealer mistakes and hand speed concerns, which were identified in various reviews and write-ups. CP 418, 423-437; West ¶ 14, ex. 1. Freddie’s management evaluated Jumamil’s dealing performance in early August

2010<sup>16</sup> and inadequate hand speed and excessive dealer mistakes were noted as continuing issues. CP 418; West ¶ 14. Specifically, Jumamil made six (6) or more major dealing mistakes in a sixty (60) day period and was dealing well below the expected minimum of rate of seventeen (17) “hands per down.”<sup>17</sup> CP 418; West ¶ 14. Again, these issues were not new for Jumamil as they had been referenced in prior evaluations. *Id.* As a result, Freddie’s upper management decided to terminate Jumamil’s employment. *Id.*

On August 17, 2010, Jumamil reported to Casino Manager Hobson and West in the upstairs office. CP 419; West ¶ 17. West asked Jumamil if she knew why she was being called to the office and her response was “yes, too many mistakes.” CP 419; West ¶ 17; CP 56; Roger Hobson Declaration ¶ 4 (hereinafter referred to as “Hobson”). West confirmed Jumamil’s suspicion about mistakes and informed her that management was terminating her due to excessive dealer mistakes and inadequate hand speed. CP 419; West ¶ 17; CP 56; Hobson ¶ 4. West encouraged Jumamil to apply for unemployment compensation and even offered to try to get her

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<sup>16</sup> Under this latest evaluation, there was no reference or comment made about whether Jumamil provided Dealer Support or was being disciplined because of it. CP 419; West ¶ 16. In fact, no dealer at Freddie’s has ever been disciplined because of Dealer Support, as it was not a requirement to work. *Id.*

<sup>17</sup> “Hands per down” or “HPD” refers to the number of games dealt during dealer’s thirty (30) minute shift. CP 415; West ¶ 6.

an interview at another local, less speed oriented, card room. CP 419; West ¶ 17. At no point was Dealer Support referenced, discussed, or contemplated as a reason for Jumamil's termination by Freddie's management or Jumamil herself.<sup>18</sup> CP 419; West ¶ 17; CP 56; Hobson ¶ 5. Jumamil was treated courteously and professionally at all times. CP 419; West ¶ 17; CP 56; Hobson ¶ 4.

On August 23, 2010, Jumamil applied for UI through the Washington State Employment Security Department ("ESD"). CP 495-497. Jumamil's application certified that the following was true and correct to the best of her knowledge:

Q 5. If you were fired or suspended for breaking a company rule: What was the rule?

A **Not Dealing fast enough**

Q 6. Did you discuss your firing or suspension with your employer? YES ✓ What was the result?

A **He said I wassent [sic.] dealing fast enough.**

CP 495-497; McAleenan ex. 3.

Freddie's further confirmed in its communication with ESD the reasons for Jumamil's termination:

Q 1. What was the final incident that caused the claimant to be discharged?

A **No final incident. A regular Employee evaluation was done for the department and some employees who did**

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<sup>18</sup> This is a critical point because if Dealer Support was the reason for Jumamil's termination, why wouldn't Defendants have identified that as the case? Defendants did not believe Dealer Support was improper because it was standard in the industry, so there would be no need to hide it or create a pretext to cover it.

**not meet standards were let go.**

CP 498-499; McAleenan ex. 3.

Consequently, Jumamil began receiving unemployment payments of approximately \$2,280.00 per month (\$570.00 per week) shortly thereafter. CP 474-475; Jumamil, p. 240 ln. 25 to p. 241, ln. 9.

Soon after Jumamil's termination, Jumamil attended a social poker game with a fellow Freddie's dealer, Dawn Kapesser ("Kapesser"), and spoke with her about her termination from Freddie's. CP 33; Kapesser Dec. ¶ 9. Jumamil again explained to Kapesser that she was let go from Freddie's for poor performance and, specifically, for too many dealer mistakes and low hand speed. *Id.* Jumamil did not reference Dealer Support. *Id.*

On October 4, 2010, Jumamil's law firm wrote to Freddie's claiming for the first time that Freddie's failed to pay minimum wage, but did not say how much. CP 593-595. Also for the first time, Jumamil's law firm alleged that Freddie's rebated Jumamil's wages, but again did not say how much. *Id.* Jumamil did, however, demand payment of \$350,000.00. CP 593. It was not discovered until almost a year later in discovery that Jumamil's minimum wage claim was less than \$280.00, and her rebating claim was for less than \$88.00, for a total wage claim of less than \$368.00. CP 593-595.

Thereafter, on October 19, 2010, Jumamil filed her Complaint in this case alleging seven (7) causes of action: 1) minimum wage violations; 2) unlawful rebating of wages; 3) Consumer Protection Act violations ("CPA"); 4) wrongful discharge in violation of public policy; 5) defamation; 6) negligent infliction of emotional distress; and 7) outrage. CP 1-8. Jumamil also made personal liability claims relating to the wage rebating under RCW 49.52.050 and .070 against West (one of four floor supervisors), and against the LLC co-owners Mudarri and Coon. CP 4; Complaint at ¶¶ 22-23.

When specifically asked at her deposition about whether anyone at Freddie's intentionally underpaid her or otherwise rebated her wages, Jumamil admitted as follows:

Q When you received your paycheck from Freddie's, did anyone take any money out of that that you did not authorize?

A No.

Q In the paychecks that you received from Freddie's, did you believe that you were getting all the money that you had earned in that pay period?

A Yes.

Q Now, and that included the amount of your hours that you worked plus the tips that you'd carry to the cage and, you know, give to the cashier and that kind of thing? The paychecks you received combined all that.

A Yes.

Q At any time do you think you were overpaid while at Freddie's?

A No.

Q So someone didn't say to you, "Ms. Jumamil, I'm going to give you more money in your paycheck, but when you get it, you've got to give me back some money."

A No.

Q Okay. No one ever said that to you.

A No.

Q Are you aware of, at any point, somebody intentionally not paying you your wages?

A No.

MR. GILMAN: Object to the form.

A No.

Q Now, and that included the amount of your hours that you worked plus the tips that you carried to the cage and, you know, gave to the cashier and that kind of thing. The paychecks you received combined all that.

A Yes.

Q At any time at Freddie's, did any manager ever tell you, or anybody in management ever tell you, that, "Once I've paid you, once you get your paycheck, in order to keep your job you need to give me a portion of your check"?

A No.

CP 476-478; Jumamil pp. 242-244, lns. 12-7.

Also, Jumamil herself testified that, during her tenure at Freddie's, West was a poker room supervisor. CP 101 at ¶ 55. "Ben" was the poker room manager. CP 101. Jumamil further understood that Newton was the manager of the entire casino, CP 101-102; *Id.* at ¶¶ 55-57, and that Newton, rather than West or Coon, was the only one at the casino to make any final decisions regarding the operation of the casino as follows:

Q So as far as you knew during the time you worked at the casino from 2006 through the summer of 2010, did you ever know anyone other than Mr. Newton to make the final decisions at the casino?

A No.

Q So he was the only person you knew to be in charge of the casino.

MR. GILMAN: Object to the form.

A Yes.

CP 114.

However, instead of filing suit against the persons at the casino whom Jumamil knew made decisions regarding the hiring and firing of employees, payroll, and withholdings, Jumamil chose to name West despite having knowledge that West merely supervised the night shift poker dealers and reported to Hoang, the Casino Manager, Hobson, and the General Manager, Newton. CP 102-103; CP 115.

Rather than attempt to rebut any of the facts set forth above, Jumamil essentially argues West is liable without any measure of culpability, under the wage claim statutes. Jumamil's argument – that West is essentially strictly liable because he was merely a supervisor without any managerial control of Freddie's – is simply not supported by the wage claim statutes or the cases interpreting those statutes.

On November 4, 2011, Jumamil voluntarily dismissed her defamation claim and her rebating claim against Mudarri. The other LLC member, Coon, was dismissed via summary judgment on January 13, 2012. CP 387.

On January 13, 2012, the Court heard Defendants' first Motion for

Partial Summary Judgment (“MPSJ I”) requesting dismissal of Jumamil’s claims concerning: 1) the CPA; 2) wrongful discharge in violation of public policy; 3) Negligent Infliction of Emotional Distress (“NIED”); 4) rebating of wages; and 5) outrage. CP 401. The Court dismissed Jumamil’s claims regarding outrage and the CPA. *Id.*

On January 27, 2012, Lakeside LLC and West filed a Motion for Partial Summary Judgment (MPSJ II) requesting dismissal of: 1) the personal liability claim against West, 2) failure to pay minimum wage action; and 3) to dismiss the wage rebating claim for lack of provable damages. CP 389-390.

On February 24, 2012, the trial court granted summary judgment as to Jumamil’s claims against West, but denied the remaining motion. CP 609-611.

**7. Orders Granting Summary Judgment Are Reviewed De Novo.**

Summary judgment motions require the court to make its own decision on a factual issue where there is only one reasonable view of the evidence in the record at the time summary judgment is sought. *Peterson v. Kitsap Community*, \_\_\_\_ Wn. App. \_\_\_\_, 287 P.3d 27, 33 (Div. II, October 23, 2012); CR 56. Whether there may be a future jury trial is of no consequence to the standard on summary judgment. Either the non-moving party creates a question of fact with admissible evidence at the

time of summary judgment, or she loses on summary judgment. “The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value.” *Hoff v. Mountain Const., Inc.*, 124 Wn. App. 538, 544, 102 P.3d 816 (2004) (citing *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). Instead, CR 56(e) specifically requires:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CR 56(e).

Moreover, as stated in the case of *Howell v. Blood Bank*, 117 Wn.2d 619, 626-627 (quoting from *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977)):

A party may not preclude summary judgment by merely raising argument and inference on collateral matters:

[T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion. . . .

**8. Arguments Or Evidence Raised After The Summary Judgment Order Should Be Stricken And/Or Disregarded.**

On appeal from an Order granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court. *Hodge v. Raab*, 151

Wn.2d 351, 354, 88 P.3d 959 (2004). Consequently, the Court only considers the evidence and the issues raised below. *Douglas v. Jepson*, 88 Wn. App. 342, 347, 945 P.2d 244 (1997) (citing *Wash. Fed'n of State Employees v. Office of Financial Management*, 121 Wn.2d 152, 156-57, 849 P.2d 1201 (1993) and RAP 9.12.)

RAP 9.12, the rule governing the scope of review specifically for summary judgment motions, clearly states as follows:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

RAP 9.12 (emphasis added).

Accordingly, in this appeal, this Court should not consider Jumamil's arguments and evidence not before the trial court at the time of the summary judgment hearing on February 24, 2012. Unfortunately, Jumamil's brief is replete with facts and assertions that were not part of the summary judgment motion before the trial court.

a. **The Court Should Either Strike Or Disregard Facts Or Assertions Not Part Of The February 24, 2012 Summary Judgment Motion.**

The case law is somewhat unclear as to whether a motion to strike extraneous evidence not before the trial court on summary judgment is the appropriate procedure, or whether a party should just alert the Court to the extraneous materials that should not be considered in the offending brief.

For example, in the recent decision in *Engstrom v. Goodman*, 166 Wn.

App. 905, 909, n.2, 271 P.3d 959 (2012), the Court stated:

[A] motion to strike is typically not necessary to point out evidence and issues a litigant believes this court should not consider. No one at the Court of Appeals goes through the record or the briefs with a stamp or scissors to prevent the judges who are hearing the case from seeing material deemed irrelevant or prejudicial. So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials not a separate motion to strike.

However, in the case of *Beaupre v. Pierce County*, 161 Wn.2d 568, 576, n.3, 166 P.3d 712 (2007), our Supreme Court granted Pierce County's motion to strike discovery requests and responses that were submitted to the Court of Appeals but were not before the trial court on summary judgment. In ruling that the documents should be stricken, the Court further noted that the plaintiff made no attempt to follow the procedures in RAP 9.10 to supplement the record at the appellate level. *Id.*

Thus, under the holdings of *Engstrom* and *Beaupre*, *supra*, the

Court should either strike or decline to consider argument and evidence not considered by the trial court on summary judgment.<sup>19</sup>

In our case, the materials considered by the trial court were set forth in the Order granting West's motion for summary Judgment. See CP 609-610. Therefore, any facts, arguments, or materials not identified in the trial court's Summary Judgment Order should not be considered on appeal.

Contrary to the above-mentioned Rules of Appellate Procedure, Jumamil's appellant's brief ("App. Br.") makes reference to the following non-exhaustive list of facts that were outside the trial court's purview on summary judgment on February 24, 2012:

- a. The results of a jury trial months later (App. Br. p.2);
- b. The results of the later jury trial, other defenses or arguments that were raised at trial, and whether Lakeside proceeded to trial or appealed the jury verdict (App. Br. p. 4-5);
- c. Whether records were disposed of at the casino, what jury instructions were given, and what findings the jury ultimately made (App. Br. p. 8, footnote 2);
- d. Whether Mudarri, the 49% member of Lakeside, LLC filed bankruptcy before Jumamil's claims arose (App. Br. p. 9);
- e. Whether Coon's company, Hana Hou Wailea, LLC owned the land and building where the casino was located (App. Br. p. 10); and
- f. The entirety of page eleven (11) of Jumamil's brief, with the exception of the date the instant appeal was timely filed (App. Br. p. 11).

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<sup>19</sup> Subject, of course, to Commissioner Schmidt's January 9, 2013 Order partially granting West and Coon's Motion to Supplement the Record on Appeal regarding Jumamil accepting payment of the alleged wages due and the resulting mootness of her appeal.

These and any other facts or assertions not before the trial court on summary judgment should either be stricken or not considered on appeal.

9. **No Improper Wage Rebating Occurred – Even If It Did, West Is Not Personally Liable.**

Jumamil's only claim against West stems from her allegations that \$288.99 of her wages were not paid, and that \$811.20 were rebated, and therefore, despite West's lack of control or management under Washington's wage claim statutes, West should be found personally liable.

RCW 49.52.050, which serves as part of the statutory basis for Jumamil's claim, states in material part, as follows:

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Willfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

...

Shall be guilty of a misdemeanor.

Thus, RCW 49.52.050 provides for criminal<sup>20</sup> liability on the part of persons who collect rebates of wages or willfully refuse to pay an

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<sup>20</sup> Jumamil has yet to establish she can prosecute her claims under this statute until after criminal liability has been determined. Considering the different burdens of proof necessary between a criminal conviction and civil liability, the statute appears to presume the Defendant first be found guilty by prosecution and then subject to a civil claim, like, for example, in *State v. Carter*, 18 Wn.2d 590 (1943). No such criminal finding is present in this case, thus Jumamil's claims are not ripe and she lacks standing.

employee's wages. Once a criminal violation is determined, RCW 49.52.070 then goes on to establish civil liability for persons who collect rebates of wages or willfully refuse to pay an employee's wages as follows:

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

RCW 49.52.070.

The Washington Legislature enacted the Wage Rebate Act:

As an Anti-Kickback statute in 1939 "to prevent abuses by employers in a labor-management setting, e.g., coercing rebates from employees in order to circumvent collective bargaining agreements." *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash.2d 514, 519–20, 22 P.3d 795 (2001). The "fundamental purpose of the legislation, as expressed in both the title and body of the act, is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages."

*LaCoursiere v. CamWest Development, Inc.* \_\_\_\_\_ Wn.App \_\_\_\_\_, \_\_\_\_\_

P.3d \_\_\_\_\_, 2012 WL 5992101 pg. 5 (Dec. 3, 2012 Div. I) quoting

*Ellerman, supra.*

10. **West Is Not An Employer, Officer, Vice-Principal, Or Agent Of Lakeside, LLC And Had No Control Over Payment, Or Non-Payment, Of Wages.**

In *Ellerman, supra*, our Supreme Court addressed the issue of who may be personally liable under the wage claim statutes found in RCW 49.52.050 and RCW 49.52.070. In *Ellerman*, Betty Handly (“Handly”) was the manager of Centerpoint Prepress, Inc. In her job as manager, Handly oversaw the corporation's business affairs. *Id.* at 517. However, she had no authority to write checks. Instead, Rosemary Widener (“Widener”), the corporation’s president, was the only person who actually signed checks on behalf of the corporation. *Id.* When an employee, Ellerman, did not receive his full pay, he filed suit against Handly, Widener and Centerpoint Prepress, Inc. *Id.* Widener and Centerpoint Prepress, Inc. settled with Ellerman, leaving only Handly as a defendant at trial. *Id.*

At trial, the court determined Handly had no liability for unpaid wages on the basis she was not an “employer” liable for wages and had not violated any statutory provisions. *Id.* at 517-518. Ellerman appealed.

On appeal, the Court affirmed judgment in favor of Handly, concluding that Handly was not personally liable because she was not “an officer, vice principal or agent” of his employer responsible for the payment of wages. *Id.* at 518. Our Supreme Court later affirmed the Court

of Appeals as follows:

It does not, however, follow that Handly is personally liable for the wages that were not paid to Ellerman or for exemplary damages. We say that because, in our view, the statute requires more than a finding that the putative vice principal is managing the employer's business. It requires the vice principal to withhold wages [w]illfully and with intent to deprive the employee of his wages. RCW 49.52.050(2). **Thus, we conclude that a vice principal cannot be said to have willfully withheld wages unless he or she exercised control over the direct payment of the funds and acted pursuant to that authority.** Although the dissent suggests that our determination is inconsistent with the common law definition of vice principal, we are satisfied that it accords with a sensible interpretation of the meaning of the statutes in question. If we reached the conclusion advanced by Ellerman, then any supervisor or manager of an employee might have personal liability if the company did not pay the employee, regardless of whether the manager or supervisor had any control over how and when the company paid its employees. Such a result would be inconsistent with the plain language of the above mentioned statutes.

*Ellerman*, 143 Wn.2d at 521 (emphasis added).

Thus, the *Ellerman* Court confirmed that only persons who have control over the payment of wages, and who act pursuant to that authority, may be found liable under the wage claim statutes.

Subsequently, in *Morgan v. Kingen*, 141 Wn. App. 143, 157 P.3d 487 (2007), *affirmed* 166 Wn.2d 526 (2009), the issue before the Court was whether corporate officers were personally liable for the non-payment of wages. There, the corporate officers were found to be liable, when:

They made decisions about payroll, controlling payments to employees and other creditors based on their decisions about which [of the corporation's] competing creditors would be paid.

*Id.* at 156-157.

Thus, consistent with the rule announced in *Ellerman*, personal liability attached where the corporate officers “exercised control over the direct payment of the funds and acted pursuant to that authority.”

*Ellerman* at 143. In other words, because these corporate officers made conscious decisions not to pay employees due to financial issues, they had control of wage decisions and merely made payment priority determination to the employee’s detriment.

It is undisputed in our case that West was one (1) of four (4) low level supervisors and reported to Hoang, Hobson, and Newton, in that order. West had no ability to hire or fire without direction or authority from his superiors. Additionally, West had no payroll, check writing, or check cashing authority for Lakeside, LLC. Based upon the foregoing, West was not a “vice principal” or an “agent” of Lakeside, LLC. Therefore, West is not subject to personal liability per *Ellerman*.

11. **Jumamil’s Reliance On The Case Of *Dickens v. Alliance Analytical Laboratories, LLC* Is Entirely Misplaced When The *Dickens* Court Specifically Declined To Determine What Level Of Management Authority And What Willful And Intentional Actions Are Necessary To Create Personal Liability Under The Wage Claim Statutes.**

Jumamil asserts that *Dickens v. Alliance Analytical Laboratories, LLC*, 127 Wn. App. 433, 111 P.3d 889 (2005), supports her argument that

West may be liable for her wage claims simply because of West's position as a floor shift supervisor or involvement in the employee's scheduling. However, the Court of Appeals' entire holding in *Dickens* was to affirm the trial court's denial of cross motions for summary judgment. *Id.* at 433. In reviewing the statute at issue, the *Dickens* court stated that the anti-kickback statute "curbs employers and certain employees with positions of financial authority, namely officers, vice-principals, or other employer agents from willfully and intentionally depriving employees of wages." *Id.* at 439.

The *Dickens* case made its way to the Court of Appeals on a motion for discretionary review to answer four (4) questions certified by the trial court regarding whether, under the holding of *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.2d 795 (2001), an agent of an entity can be liable under the wage claim statute, RCW 49.52.070, simply because an agent has certain authority, or whether it is necessary that the agent actually exercise that authority.<sup>21</sup> *Id.* at 437.

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<sup>21</sup> The four (4) questions were as follows:

1. What is the definition of an "agent" under RCW 49.52.050, and what does a plaintiff have to prove in order to hold a defendant personally liable as an agent of an employer?
2. Is it enough that the purported agent have some power and authority to make decisions regarding the payment of wages, or must the purported agent have actually exercised such authority?
3. If actual exercise of authority is not required, what else, if anything must the plaintiff prove?

The Court of Appeals declined to answer any of the four (4) questions, stating that it does not provide advisory opinions. *Id.* at 437. Instead, the Court of Appeals confined review to, “the narrow context of whether the trial court erred in denying the cross-motions for summary judgment on the issue of [one defendant’s] personal liability.” *Id.*

In ruling that the trial court properly denied the cross motions for summary judgment, the Court of Appeals noted that there was a continued dispute as to the agent’s “management role and his knowledge of payroll matters.” *Id.* at 441. The Court further noted that the parties had an ongoing dispute as to the agent’s alleged “willful and intentional actions” that were “surrounded by material facts precluding summary judgment.” *Id.* Thus, the Court of Appeals remanded the matter for further development of the facts, including piercing the corporate veil analysis. *Id.* at 443. Consequently, *Dickens* does not preclude summary judgment in this case, where Jumamil failed to come forward with any facts that West was an employer or agent under the statute or had any control over hiring, firing, paying, or not paying wages or that he committed any willful or intentional actions relating to the payment of her wages.

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4. Does the summary judgment record allow either party to prevail as a matter of law on the certified issues?  
*Id.* at 436.

12. **Jumamil Failed To Establish Any Question Of Material Fact That West Had Ever Received A Rebate Of Her Wages.**

Jumamil claims her wages were rebated based upon the Dealer Support policy that was briefly in place from April to October in 2010. However, in her deposition, Jumamil conceded that the poker losses she suffered went to the other poker players at the table, not to Freddie's, and certainly not to West:

- Q I presume that while you were doing Dealer Support, you played some hands. Is that right?
- A Right.
- Q And some of the hands you lost; is that right?
- A Right.
- Q Okay. Other than the rake, where \$3 would go towards the house and \$2 would go to the jackpot, where did the money you lost go?
- A To the other players.
- Q And those were not casino employees; is that right?
- A Uh, some of them are casino employees that sit on my table; some of them are players.
- Q But those casino employees, they were fellow dealers; is that right?
- A Yes.
- Q So they didn't take money they won from you and hand it back to the casino. They would keep it for themselves; is that right?
- A Yes.
- Q Just like you would do if you won. You would keep money from your fellow dealers for yourself.
- A Yes.

CP 116-117.

Instead, as Jumamil concedes, only a very small percentage of her gambling losses would have gone to Freddie's in the form of a \$3.00

“rake.”<sup>22</sup> CP 116-118; Jumamil Dep. 190-193.

Jumamil has conceded in her deposition:

Q I'm not asking for a number. I'm asking if you agree with me that only a very small amount of your money out of any total hand that you played in went to the casino.

A I think so.

CP 118.

Q All right. So hypothetically, if we assume that your gambling losses that you've listed in your interrogatory answers are accurate -- even though you claim they're estimates, we have around \$2,300 worth of gambling losses -- you can't tell me how much of that money would have gone to the casino in the form of the rake or in the form of any money taken out of the jackpot.

A No, I don't.

Q So you would agree, based on your testimony last time, that it would be a small percentage of that.

A Yes, it's a small -- I don't know if it's 0.1; I don't know if it's 8 percent. The fact that he still got some of that amount.

CP 120.

In the case at bar, West has neither “collected” nor “received” any part of the Jumamil’s wages. There is no allegation or facts raised that support West either collected or received money from Jumamil like in *State v. Carter, supra*, or received a TV like in *Byrne v. Courtney Ford*,

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<sup>22</sup>The \$3 rake and \$0.20 jackpot administration fee would necessarily be comprised of the combined funds of the other poker players who wagered in the game, the poker players who placed the “big blind” and “small blind” forced bets, and Jumamil’s wagers, if any. Thus, the fractional percentage of the \$3.00 “rake” and \$0.20 administration fee that is attributable to Jumamil cannot be determined unless the number of players wagering in a hand is known, the amount of each player’s wagers, and the amount wagered by Jumamil.

*Inc.*, 108 Wn. App. 683, 690-691, 32 P.3d 307 (2001), or even received stock options and bonuses like in *Lacoursiere*, *supra*, 2012 WL 5992101. Under the statute, only the individuals actually receiving Plaintiff's wages are liable.

In short, Jumamil's claim that West is individually liable for a wage rebating claim, when West never collected or received a cent of Jumamil's wages, is unsupported by the statute or related case law. To hold otherwise would be putting all supervisors or low level managers, who neither collected nor received wages, in the scope of criminal liability.

**13. This Court May Affirm The Trial Court's Decision On Any Grounds, Including That No Rebating Of Wages Occurred Under The Undisputed Facts.**

The Washington Legislature enacted the "anti-kickback" statute, RCW 49.52.050(1), in 1939 "to prevent abuses by employers in a labor-management setting, e.g., coercing rebates from employees in order to circumvent collective bargaining agreements." *Ellerman* at 519-520. To violate subsection (1) of RCW 49.52.050, an employer must "collect or receive" a "rebate" of wages "theretofore paid". The term "rebate" is not defined in the statute. Therefore, the term is given its plain and ordinary meaning as defined in a standard dictionary. *State v. Marohl*, 170 Wn.2d 691, 699, 246 P.3d 177(2010). "Rebate" is defined as "a retroactive

abatement, credit, discount, or refund ....” in Webster's Third New International Dictionary p. 1892 (1993).

The rebating of wages portion of RCW 49.52.050 has rarely been applied or interpreted since the “anti-kickback” statute was enacted in 1939. *McDonald v. Wockner*, 44 Wn.2d 261, 267 P.2d 97 (1954), our Supreme Court affirmed a trial court’s finding that Wockner, the employer, had rebated wages from one of his employees. In *McDonald*, the employee worked as a car salesman at an automobile dealership. The salespersons were employed under a collective bargaining agreement and were paid commissions for car sales. Shortly after each payday, the employee would go into Wockner’s office where, with the blinds down, he would pay the employee in cash the amount by which his sales commissions exceeded the sum of three hundred fifty dollars. *Id.* at 263. Not too surprisingly, under these facts where the employee was required to directly repay his wages to his employer, Wockner, our Supreme Court affirmed the finding that the employee’s wages had been rebated. The facts in *McDonald* are quite dissimilar to those in our case.

However, just because a portion of an employee’s wages may later be applied for the benefit of an employer does not mean that RCW 49.52.050 has been violated. In *State v. Carter*, 18 Wn.2d 590, 615, 142 P.2d 403 (1943), Carroll Carter, the King County Clerk, successfully ran

for and was elected as the King County Treasurer. During the course of the campaign, Carter incurred campaign debts totaling \$3,500.00. *Id.* Following the election, Carter gave the employees of the treasurer's office pay raises, and elevated one employee to the position of chief clerk with an accompanying pay raise of over 30%. *Id.* Upon the chief clerk learning that Carter had \$3,500.00 in unpaid campaign debts, the chief clerk scheduled a meeting of the treasurer's office as follows:

At that meeting, which was attended by all of the appointive office employees, [the chief clerk] opened the discussion by stating that their 'new boss,' the defendant, had taken steps to see that they were well treated, and that they should all feel satisfied to work for 'a man like that.' Then, after explaining that the defendant had contracted a 'political debt' of about thirty-five hundred dollars, [the chief clerk] stated that the meeting had been called to ascertain the opinion of those present 'as to liquidating the debt for Mr. Carter.' After some general discussion, it was suggested that the amount be raised by contributions from the employees in proportion to their respective salaries. The suggestion was adopted and [the chief clerk] agreed to compute the amount of each employee's proposed contribution and make the collections accordingly.

. . .

Pursuant to the understanding previously had, [the chief clerk] computed the amounts of the expected contributions on the basis of a sum equivalent to ten per cent of each employee's salary during each of the next three months. . . . Some of the employees, however, being or becoming dissatisfied with the proposed arrangement for contribution, declined thereafter to take part, and later voluntarily resigned their positions.

*Id.* at 616-617.

Later, one of the treasurer office employees complained to the

prosecuting attorney that the employees in the office of the treasurer were rebating a portion of their wages to Carter. *Id.* at 617. Carter was then charged, and later convicted, of eight (8) counts under the “anti-kickback” statute for receiving a rebate of his employee’s wages. *Id.* at 618.

On appeal, our Supreme Court reversed Carter’s wage rebate convictions. The *Carter* Court reasoned:

[h]aving once received his wages in full, the employee is at liberty to do what he will with his earnings, so long as he does not violate some positive rule of law governing his action. He may keep the money in his pocket, invest it, spend it, or give it away.

*Id.* at 622.

If the contribution is voluntary, it does not necessarily constitute a rebate of wages merely because it moves to, or for the benefit of, the employer. *Id.* at 623. In concluding that Carter had not received a rebate of his employees’ wages, the Court stated:

**[i]f an employee exercises his free choice in making a contribution, even though in response to a request [on behalf of the employer], his act does not amount to a rebate of his wages within the meaning of the [anti-kickback] statute. . . .**

*Id.* (emphasis added).

Plaintiff herself unequivocally stated in deposition that the Dealer Support was not mandatory as follows:

Q     Okay. Did anybody ever say you would be fired if you didn't do it?  
A     No.

Q Did you ever read anywhere that you would be fired if you didn't do it?

A No.

CP 108.<sup>23</sup>

Q Okay. Now, were you able to put in your six -- After this vote --

A Yes.

Q -- happened, were you able to put in your six hours per week?

A Yes, for a few weeks.

Q Okay. Did your schedule at all change for those few weeks?

A No.

Q Okay. So let me go back. So you did it for a few weeks. After that you decided you couldn't do it any longer.

A Yes.

Q Okay. Did your schedule change?

A No.

CP 110.

In the case at bar, Jumamil elected to play poker for six (6) hours a week at the beginning of the Dealer Support, and a few weeks later chose not to play poker for six (6) hours a week. Thus, Jumamil's own actions show that she understood the Dealer Support was voluntary. Various other dealers also chose not to provide Dealer Support, including Daniel Carruthers, Tera Frydenlund, and Jenni Sales. CP 26-27, 28-29, 32-33, 44-45. Because the Dealer Support was voluntary, under the holding of *State*

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<sup>23</sup> Later, in the same deposition, Jumamil recanted her earlier statement and claimed that she was told that she would no longer have a job if she did not provide Dealer Support. CP 263.

*v. Carter, supra*, the fact that a miniscule portion of amounts wagered by Jumamil under this voluntary policy may have made its way to the casino in the form of the \$3.00 rake does not constitute a rebating of Jumamil's wages against the casino, let alone against West.

Like the facts in *Carter*, once Jumamil received her wages, she was free to play with them or not, and anything she gave back to the casino was not a wage or a rebate of wages.

**14. Even If Jumamil's Minimal Dealer Support Amounted To A Rebate Of Wages, It Was Not Willful On The Part Of West, And Jumamil Knowingly Submitted Thus Cannot Recover Under RCW 49.52.070.**

**a. Damages Under RCW 49.52.070 Are Only Available For Willful Wage Rebating And Withholding.**

Washington law is clear that damages pursuant to RCW 49.52.070 are only available "for the willful withholding of wages." *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986). "The non-payment of wages is willful when it is the result of a knowing and intentional action. . . ." *Lillig*, 105 Wn.2d at 659; see also *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d 282, 300, 745 P.2d 1 (1987). To prove a violation of RCW 49.52.050, the employee must provide affirmative evidence of intent to deprive an employee of wages. *Pope v. Univ. of Wash.*, 121 Wn.2d 479, 491 n.4, 852 P.2d 1055 (1994). Because RCW 49.52.050 includes the element of willfulness, in order to

find personal liability on the part of an officer, vice principal or agent of any employer for the non-payment of wages under RCW 49.52.070, a claimant must prove that the officer, vice principal or agent willfully exercised control over the non-payment of wages. *See, e.g., Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.2d 795 (2001); *see also Pope v. Univ. of Wash.*, *supra*, 121 Wn.2d 479, 491 n.4 (“The ... argument that RCW 49.52.050 establishes liability without fault is not persuasive.”).

**b. Jumamil Knowingly Submitted To Any Minimal Wage Rebating Or Withholding.**

The enforcement provision of RCW 49.52.070 contains a caveat which blocks recovery of benefits under the statute as follows:

...the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

RCW 49.52.070.

In our case, like the employee in *Lacoursiere*, *supra*, Jumamil voluntarily employed with Lakeside LLC and thereafter voluntarily agreed to provide minimal Dealer Support. Jumamil and numerous other dealers confirmed that Dealer Support was not required for continued employment at Lakeside, which was evidenced by the fact that numerous other dealers who did not provide Dealer Support remained employed at Freddie’s before and after Jumamil’s termination. CP 29-30, 32-33, 41-42, 44-45. Thus, like the plaintiff’s voluntary acts in *Lacoursiere*, providing Dealer

Support was discretionary and Jumamil had full control over her funds and was free to do with them as she wished. By virtue of the fact Jumamil provided minimal Dealer Support, which obviously benefitted her tips and accountings too, she “knowingly submitted” to any violation of the statute if there was one.

A similar analysis is also evident in the holding of *State v. Carter*, *supra*. Jumamil, like the employee in *Carter*, was making “contributions” by providing Dealer Support. Such contributions or Dealer Support was not clearly made by the employees out of their “wages.” *Id.* at 624. “For aught that is shown, the amounts paid by them may have come from other personal funds in their possession.” *Id.* at 624. Again, by virtue of Jumamil’s voluntary participation in Dealer Support, as she had done for many years previous, provides safe harbor to West under any potential claim under a “knowing participation” exception under the statute.

15. **Jumamil’s Claims Are Moot As She Has Already Been Paid The Very Same Wage Claim Damages She Continues To Assert Against West In This Appeal.**

“A case is considered moot if there is no longer a controversy between the parties, if the question is merely academic, or if a substantial question no longer exists.” *Hough v. Stockbridge*, 113 Wn. App. 532, 536, 54 P.3d 192 (2002), rev'd in part on other grounds, 150 Wn.2d 234, 76 P.3d 216 (2003). If a court can still provide effective relief, a case is

not moot. *Id.* at 537, 54 P.3d 192. A court may also rule on a moot issue if it presents an issue of continuing and substantial public interest. *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).

In our case, Jumamil's wage claims are moot because subsequent to the trial court's dismissal of her wage claims against West and Coon, Jumamil accepted payment of those same wages from another Defendant in a different case. See Exhibit 1, CP 631-663.

Specifically, on July 2, 2012, Jumamil filed another lawsuit against Coon, Newton, and Hana Hou Wailea, LLC under Pierce County Superior Court Cause No. 12-2-10502-8 ("2012 lawsuit"). See Exhibit 1 attached hereto; CP 640-646. In this new lawsuit, while overlooking the doctrines of estoppel, res judicata, the prohibition of "claim splitting," and CR 19-20, Jumamil alleged the exact same minimum wage and rebating claims she is making in this appeal, but against Newton, who was the General Manager of Freddie's. *Id.*

In the 2012 lawsuit, rather than incur the attorney's fees necessary to prepare a motion to dismiss Jumamil's claims, given the de minimis amount of Jumamil's wage claims (\$288.99 in minimum wages, and \$811.20 in alleged wage rebating), on August 23, 2012 Newton tendered payment of the wages and damages Jumamil claimed were due by

delivering to Jumamil and filing with the trial court a “Tender of Wages

Due” stating that:

COMES NOW, Michael E. McAleenan of Smith Alling, PS, attorney of record for Defendants Jack and Brenda Newton, and hereby provides notice that the alleged unpaid and rebated wages Plaintiff claims are owed in the above-captioned matter have been tendered to Plaintiff as reflected in the attachments hereto.

See Exhibit 1; CP 655-657.

Rather than argue over whether Jumamil was entitled to double damages under the wage claim statutes, Newton tendered double the alleged amounts due, plus interest, totaling \$2,794.48. *Id.* The July 20, 2012 letter sent with the wage payment stated in relevant part:

As you are aware, this office represents Jack Newton and Brenda Newton in the above-referenced lawsuit. In the Complaint, Plaintiff alleges that Jack Newton is liable for willful nonpayment of minimum wage per the jury verdict in Pierce County Superior Court Cause No. 10-2-14125-7 in the amount of \$288.99, and for willful rebating of Ms. Jumamil’s wages in the amount of \$811.20. Defendants Newton deny and all liability for such allegations.

Notwithstanding, on behalf of the Newtons, enclosed please find this firm’s check #53462 made payable to Ruby Jumamil in the amount of \$2,794.48, representing payment of any wages she claims due, doubling of damages, and 12% interest.

In the event Ms. Jumamil refuses to accept the payment as enclosed herein, I do not see how your client can support a claim that the Newtons willfully refused to pay Ms. Jumamil wages due, or any rebating of the same, due to the fact that no prior demand has been made upon the Newtons other than the filing of this lawsuit.

...

Ms. Jumamil is free to cash the enclosed check, but she can no longer say that she has not been paid the wages she alleges are due or owing. In the event Ms. Jumamil has no intention of cashing the enclosed check, please return the check to my office within fourteen days.

Exhibit 1; CP 656-657.

Jumamil accepted Newton's tender, cashed the check, and dismissed Newton from the new 2012 lawsuit. See Stipulated Order of Dismissal and copy of endorsed and cashed check. Exhibit 1; CP 660-663. In other words, since the trial court's summary judgment order dismissing West and Coon, Jumamil has received and accepted the double wages she claimed were due to her, in addition to interest. Therefore, the very claims Jumamil continues to allege against West and Coon in this appeal are moot. Moreover, to proceed would only pave a path for an impermissible double recovery by being paid for the same wage claims twice.

The facts in our case are similar to those in *Yates v. State Board for Community College Education*, 54 Wn. App. 170, 773 P.2d 89, rev. denied (1989). In that case, Yates, a guidance counselor, sued College alleging it willfully refused to pay wages due. *Id.* at 171. The court dismissed Yates' claims after he accepted payment of the alleged wages due per subsequently executed Collective Bargaining Agreement. *Id.* at 174.

Division III of the Court of Appeals affirmed the trial court's dismissal of the case.

In our case, Jumamil, like *Yates, supra.*, filed an action for recovery of wages allegedly owed and sought damages for willful withholding of those wages pursuant to RCW 49.52.050 and .070. Jumamil, like *Yates*, subsequently accepted payment of the alleged wages due. This court, like the *Yates* court, should also hold that Jumamil's wage claims have been paid, thus this appeal is now moot.

16. **A Plaintiff Cannot Recover The Same Damages From Multiple Defendants In Multiple Lawsuits.**

Jumamil is expected to argue she can recover her wages from multiple Defendants, but has yet to cite any authority. This is not surprising considering that the purpose of the wage statutes are to recover "payment of wages due" to make the party whole – not create a windfall. *See Shilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998). Jumamil's implicit argument, however, is that because a jury found her employer, Lakeside Casino, LLC, owed her \$1,100.00 for minimum wage and rebating, that she can then go on to collect that same \$1,100.00 in wages from the LLC, then another \$1,100.00 in wages from the LLC's general manager (Newton) individually, then another \$1,100.00 from the LLC's member (Coon) individually, and then another \$1,100.00

from her shift supervisor (West) individually – for a total of \$4,400.00 for the same original \$1,100.00 wage claim. Considering that the intent of the statute is remedial, Jumamil should not be afforded the opportunity to compound her award against the LLC and hold individuals strictly liable regardless of liability.

Indeed, Washington law prohibits the filing two separate lawsuits based on the same event, which is known as “claim splitting.” *Ensley v. Pitcher*, 152 Wn. App. 891, 898, 222 P.3d 99 (2009). Res judicata bars such claim splitting if the claims are based upon the same cause of action. *Id.* at 899 (citing 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.33, at 479 (1st ed.2007) (distinguishing collateral estoppel’s requirement that the issue be actually litigated from res judicata’s more lenient standard where issues that could have been litigated and resolved are barred)).

Res judicata acts to bar duplicative litigation, where the subsequent action is identical with a prior action in four respects: “(1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” *Id.* at 902. Different defendants in separate suits are the same party for res judicata purposes as long as they are in privity. *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995).

In *Kuhlman v. Thomas*, the plaintiff first filed suit against his employer, the Seattle Housing Authority, alleging various claims arising out of the employer/employee relationship. After the first lawsuit was dismissed on summary judgment, the plaintiff filed a second lawsuit against individual officers and employees whom he blamed for the employment claims. In holding that the second lawsuit was barred by res judicata, the *Kuhlman* court held that the employer/employee relationship is sufficient to establish privity for res judicata. *Kuhlman*, 78 Wn. App. at 121–22 (holding that where the ultimate issue of whether the employer had violated the plaintiff's rights turned on the propriety of its employees conduct, the parties must be viewed as sufficiently the same, “if not identical”).

In our case, Jumamil alleged wage claims against her employer, Lakeside, LLC, one of its owners, Coon, and one of her supervisors, West. Following a final judgment in that case, she filed the identical wage claims against Lakeside Casino, LLC's manager, Newton. *See* Exhibit 1, CP 640-646. Jumamil then accepted payment for her claimed wages from Newton. Exhibit 1, CP 655-663. For purposes of res judicata, Jumamil's employer, Lakeside Casino, LLC and its agents, Respondents Coon and West, and the casino's former manager, Newton, are identical.

Jumamil is plainly overreaching and attempting to disguise her law

firm's efforts to recover attorney fees and costs against Respondents even though no such fees or costs were awarded against Respondents or Newton. To condone Jumamil's approach would equate to an expansive reading and interpretation of Washington's wage statutes far beyond the Court's current liberal interpretation which is intended to ensure an employee receives "the wages they are due" – not a windfall.

**17. Newton Did Not "Settle" Or Get "Released" From Jumamil's Wage Claims – He Paid Them.**

The wages Newton paid to Jumamil for the wage and rebating claims against him are the same wages Jumamil claims due in this case against West and Coon.

Jumamil is expected to argue that she "settled" her wage claims against Newton, and that by making the same claims against West and Coon, she is not prohibited from attempting to make a double recovery. However, the funds paid by Newton to Jumamil were not a "settlement," but rather Newton's "Tender of Wages Allegedly Due." Exhibit 1, CP 655-657.

Attached to the "Tender of Wages Allegedly Due" is the \$2,794.48 check that Jumamil endorsed and had cashed. Exhibit 1, CP 655-657, 663. Nowhere in this tender or on the check does it reference that this was a "settlement" or anything other than tender of the wages Jumamil claimed

were due for her minimum wage and rebating claims. At the very least,<sup>24</sup> the doctrine of estoppel would preclude Jumamil from attempting to recover the same wages over and over.

Finally, Jumamil is expected to argue she incurred costs and fees advancing her claims. Said costs and fees are irrelevant because they were primarily incurred in Jumamil's jury trial against Lakeside, LLC, not against Coon or West who had long since been dismissed.

**18. Once Jumamil Accepted Payment of Her Wages, There Is No Controversy To Decide On Appeal.**

Jumamil will likely argue that this Court can still provide effective relief because she wants this Court to review dealer support, an employment practice that continues in Washington's casinos. To pursue such an argument is entirely weakened by the fact that her employer, Lakeside, LLC, closed and filed for Chapter 7 Bankruptcy in June 2012,<sup>25</sup> that she accepted payment of wages due from Newton, that she no longer works in a casino, and now essentially wants this Court to provide an advisory opinion regarding some unknown and unnamed casinos who are not before this Court. This Court should continue to decline issuance of advisory opinions. *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920

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<sup>24</sup> Notwithstanding the obvious deficiencies of such a claim under CR 19 and 20.

<sup>25</sup> Neither Lakeside Casino, LLC nor its membership are involved with any other casino operations.

(1994).

**19. Once Jumamil Accepted Payment of the Disputed Wages and Damages, There Is A Bona Fide Dispute Over Further Obligations To Pay.**

Not only have Jumamil's wages and damages now been paid by Newton, thus making the matter moot, but Jumamil's claims under RCW 49.52.050 and .070 can no longer be argued because there is no dispute over payment of wages. RCW 49.52.050 makes the payment of a lower wage than an employer is obligated to pay unlawful if it is done "willfully and with the intent to deprive the employee of any part of his wages ...." These elements cannot be met if evidence shows a bona fide dispute over debatable issues related to the obligation to pay. *Id.* at 176, citing *Lillig v. Beckton-Dikinson*, 105 Wn.2d 653, 659-60, 717 P.2d 1371 (1986); *Cameron v. Neon Sky, Inc.*, 41 Wn. App. 219, 222, 703 P.2d 315, *rev. denied*, 104 Wn.2d 1026 (1985). Again, by virtue of Jumamil accepting the disputed wages and damages due, a bona fide dispute exists over any further obligation to pay. Thus, Jumamil's claims would be properly denied further review.

**20. Attorney Fees.**

Jumamil has requested an award of attorney fees and costs per the prevailing Plaintiff provisions under the wage statutes. Even if this court were to reverse the trial court's decision, Jumamil would not be a

“prevailing Plaintiff” under the statutes because that issue would remain to be determined on the merits before the trial court. Jumamil’s request for attorney fees and costs should be denied.

### **III. CONCLUSION**

Based upon the foregoing, Respondent Douglas West respectfully requests the Court affirm the trial court’s summary judgment dismissal and/or deny Jumamil’s request for relief based upon the mootness of her claims.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of January, 2013.

SMITH ALLING, P.S.

By M. McAleenan  
Michael E. McAleenan, WSBA #29426  
Attorney for Respondent West  
1102 Broadway Plaza, Suite 403  
Tacoma, WA 98402  
253-627-1091 ▪ 253-627-0123 (fax)  
mmc@smithalling.com

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

RUBY JUMAMIL,

Plaintiff,

v.

LAKESIDE CASINO, LLC, a Washington  
limited liability company d/b/a FREDDIE'S  
CLUB CASINO OF FIFE; NOEL COON  
and JANE DOE COON, husband and wife;  
SUSAN MUDARRI and JOHN DOE  
MUDARRI, husband and wife; and DOUG  
WEST and JANE DOE WEST, husband and  
wife,

Defendants.

No. 10-2-14125-7

DECLARATION OF MICHAEL E.  
McALEENAN

MICHAEL E. McALEENAN declares as follows:

1. I am the attorney for Defendant Doug West ("West") in this case, and  
represent Mr. West in Plaintiff's appeal of Mr. West's dismissal before the Court of Appeals,  
Division II, Cause No. 43620-5-II. I was also trial counsel for Lakeside Casino, LLC in the  
underlying trial court matters. I also acted as counsel for Defendant Jack Newton ("Newton")

DECLARATION OF MICHAEL E. McALEENAN – Page 1

**SMITH ALLING**  
ATTORNEYS AT LAW

1102 Broadway Plaza, #403  
Tacoma, Washington 98402  
Tacoma: (253) 627-1091  
Facsimile: (253) 627-0123

1 in Plaintiff Ruby Jumamil's ("Jumamil") other Pierce County Superior Court lawsuit under  
2 Cause No. 12-2-10502-8. I make this Declaration based upon personal knowledge.

3 2. Attached hereto as Exhibit 1 is a true and correct copy of Court of Appeals/  
4 Commissioner Schmidt's January 9, 2013 ruling granting in part Respondent's Motion to  
5 Supplement the Record and Include Additional Evidence on Review.

6 3. Attached hereto as Exhibit 2 is a true and correct copy of Jumamil's Complaint  
7 filed July 2, 2012 against Newton, Noel Coon, and Hana Hou Wailea, LLC under Pierce  
8 County Superior Court Cause No. 12-2-10502-8. The wage claims alleged by Jumamil  
9 against Newton in this new case are the same as those originally made by Jumamil in the  
10 10-2-14125-7 case against West and Coon and at issue on appeal. See pg. 5 of Exhibit 2  
11 hereto and compare to Jumamil's Original Complaint in this case, CP 1.

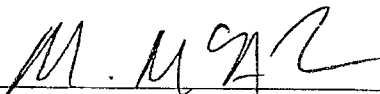
12 4. Attached hereto as Exhibit 3 is a true and correct copy of the Notice of Tender  
13 of Wages Allegedly Due filed by Newton on August 23, 2012 under Pierce County Superior  
14 Court Cause No. 12-2-10502-8 in response to Jumamil's minimum wage and wage rebating  
15 claim against Newton. The tender was for \$2,794.48, which included \$288.99 awarded by the  
16 jury for Jumamil's unpaid wage claim, \$811.20 on her rebating claim, and then doubled with  
17 interest at twelve percent (12%), as calculated in the included August 23, 2012 communica-  
18 tion to Jumamil's counsel.

19 5. Attached hereto as Exhibit 4 is a true and correct copy of the Stipulated Order  
20 of Dismissal entered October 18, 2012, dismissing Newton from Cause No. 12-2-10502-8,  
21 with prejudice, as a result of the tender of wages referenced in paragraph 4 above.

22 6. Attached hereto as Exhibit 5 is a true and correct copy of the front and back of  
23 the check from this office payable to Ruby Jumamil as referenced in paragraphs 4 and 5

1 above. This check was accepted, cashed, endorsed, and paid to Jumamil no later than  
2 October 10, 2012.

3  
4 I certify, under penalty of perjury, under the laws of the State of Washington that the  
5 foregoing is true and correct. Executed at Tacoma, Washington on the 14<sup>th</sup> day of January,  
6 2013.

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Michael E. McAleenan

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## Declaration Of Service

I hereby certify that I have this 14th day of January, 2013, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

***Counsel for Plaintiff/Appellant:***

Ms. Stephanie Bloomfield

Mr. Eric D. Gilman

Gordon Thomas Honeywell, PLLC

1201 Pacific Ave., Suite 2200

P.O. Box 1157

Tacoma, WA 98401-1157

sbloomfield@gth-law.com

egilman@gth-law.com

\_\_\_\_\_ Hand Delivery

\_\_\_\_\_ U.S. Mail (first-class,

X postage prepaid)

\_\_\_\_\_ ABC Legal Messengers

\_\_\_\_\_ Facsimile

X Email

***Court:***

Washington State Court of Appeals

Division Two

950 Broadway, Suite 300

Tacoma, WA 98402-4454

coa2filings@courts.wa.gov

X Hand Delivery

\_\_\_\_\_ U.S. Mail (first-class,

\_\_\_\_\_ postage prepaid)


\_\_\_\_\_ ABC Legal Messengers

\_\_\_\_\_ Facsimile

X Email

I declare under penalty of perjury under the laws of the State of Washington that the I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of January, 2013, at Tacoma, Washington.

  
JULIE PEREZ

# **EXHIBIT 1**

# **EXHIBIT 1**



# Washington State Court of Appeals

## Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

January 9, 2013

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Stephanie Bloomfield  
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PO Box 1157  
Tacoma, WA 98401-1157  
sbloomfield@gth-law.com

CASE #: 43620-5-II

Ruby Jumamil, Appellant v. Lakeside Casino, LLC, et al., Respondents

Counsel:

On the above date, this court entered the following notation ruling:

### A RULING BY COMMISSIONER SCHMIDT:

The Respondents' motion to include additional evidence is granted in part. The record is supplemented with Exhibits 1, 3, 4 and 5 to the Motion to Supplement the Record and Include Additional Evidence on Review. Those documents may change the result of the appeal. But the Respondents do not establish that those exhibits moot this appeal because the Appellant may still receive effective relief. The documents should be designated within 15 days of the date of this ruling and may be appended to the Respondents' brief, which is now due 1/22/13.

Very truly yours,

A handwritten signature in black ink, reading "David C. Ponzoha", is written over a circular stamp that partially obscures the signature.

David C. Ponzoha  
Court Clerk

## **EXHIBIT 2**

July 02 2012 9:39 AM

KEVIN STOCK  
COUNTY CLERK  
NO: 12-2-10502-8

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

RUBYVEE JUMAMIL,

Plaintiff,

vs.

NOEL COON and JANE DOE COON and their  
marital community; JACK NEWTON and  
BRENDA NEWTON and their marital  
community; SUSAN MUDARRI and JOHN DOE  
MUDARRI and their marital community; and  
HANA HOU WAILEA, LLC, a Washington limited  
liability corporation,

Defendants.

NO.

COMPLAINT

Plaintiff alleges as follows:

I. NATURE OF THE ACTION

1. In his capacity as General Manager of Freddie's Club Casino of Fife ("Freddies"), Defendant JACK NEWTON implemented a policy wherein casino employees, under Newton's direct supervision, were required to gamble for six hours per week, on their own time, and with their own money as a condition of employment.

COMPLAINT - 1 of 7

(No. \_\_\_\_\_ Error! Reference source not found.)  
[100044264.docx]

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
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2. Following a two-week trial, a Pierce County jury determined that through this six-hour gambling policy, Freddie willfully violated Washington's Minimum Wage Act and Washington's "Anti-kickback" statute with respect to Plaintiff.

3. In the days following entry of the Superior Court judgment, Freddie's, under the direction of Defendants Newton and Noel Coon, began liquidating assets and emptying and closing its bank accounts.

4. As an officer and general manager of Freddie's, Defendant Newton is individually liable to Plaintiff for the unlawful wage practices he implemented.

5. Defendants are liable to Plaintiff for the value of fraudulent transfers by Freddie's.

6. Defendants are individually liable to Plaintiff for the full amount of her judgment as they have abused the corporate form to improperly drain cash and assets from Freddie's before and after the judgment was entered.

## II. JURISDICTION AND VENUE

7. Defendants committed many of the acts alleged herein in Pierce County, Washington.

8. Jurisdiction and venue are proper in Pierce County Superior Court.

### III. PARTIES

9. Plaintiff Rubyeve Jumamil is a Washington resident. At all relevant times, Plaintiff was over the age of 18 and worked for Freddie's in Pierce County, Washington.

10. Defendant Newton was at all relevant times an officer, vice principal, or agent of Freddie's Club Casino in Fife, Washington. At all relevant times, he was listed

COMPLAINT - 2 of 7  
(No. \_\_\_\_\_)  
[100044264.docx]

LAW OFFICES  
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1 with the Washington Secretary of State as a Governing Person for Lakeside Casino, LLC  
2 and had authority over all matters as general manager of Freddie's.

3 11. The acts alleged herein against Jack Newton were carried out on behalf of  
4 and for the benefit of the marital community of Jack and Brenda Newton.

5 12. Defendant Mudarri was at all relevant times a member and governing  
6 person of Lakeside Casino, LLC.

7 13. Defendant Coon was at all relevant times the managing member of  
8 Lakeside Casino, LLC. Defendant Coon is also the sole managing member of Defendant  
9 HANA HOU WAILEA, LLC.

10 14. Defendant Hana Hou Wailea, LLC owns the property and improvements  
11 where Freddie's operates in Pierce County.

12  
13 IV. FACTS

14 15. Plaintiff worked as a card dealer in the poker room at Freddie's for  
15 approximately four years.

16 16. In 2010, Defendants implemented a policy at Freddie's requiring its poker  
17 room dealers, including Plaintiff, to gamble in the casino for six hours each week.

18 17. Plaintiff was required to gamble using her own money and received no  
19 reimbursement for her losses.

20 18. Plaintiff was not compensated for all hours that she was required to  
21 gamble.

22 19. Poker dealers who did not gamble the required six hours per week lost  
23 "seniority," resulting in a loss of hours and income.

24  
25 COMPLAINT - 3 of 7

26 (No. \_\_\_\_\_)  
[100044264.docx]

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
1201 PACIFIC AVENUE, SUITE 2100  
POST OFFICE BOX 1157  
TACOMA, WASHINGTON 98401-1157  
(253) 620-6500 - FACSIMILE (253) 620-6565

1           20. On May 4, 2012 a Pierce County jury (Superior Court Cause No.  
2 10-2-14125-7) issued a verdict finding, among other things, that under Defendants' six-  
3 hour gambling policy:

- 4           a. Freddies had failed to compensate Plaintiff for all hours worked;  
5           b. Freddies' failure to compensate Plaintiff for all hours worked was "willful";  
6           c. Freddies required Plaintiff to rebate wages to Freddies;  
7           d. Freddies' rebate of Plaintiff's wages was "willful";  
8           e. Freddies' wrongfully discharged Plaintiff in violation of public policy after  
9 she refused to comply with Defendant Newton's unlawful gambling  
10 requirements.  
11

12 A true and correct copy of the jury verdict is attached hereto as Exhibit A.

13           21. Defendant Newton developed, approved, implemented, supervised, and  
14 enforced the six-hour gambling policy that the jury determined was a willful violation of  
15 Washington law.  
16

17           22. On June 8, 2012, the Court entered judgment on the jury's verdict,  
18 including judgment for attorneys' fees of \$125,000 and costs of \$10,000 for a total  
19 judgment of \$165,000.38. A true and correct copy of the judgment is attached hereto as  
20 Exhibit B.

21           23. Freddies, under the direction of Defendants Newton and Coon, transferred  
22 assets to third parties with the intent to avoid paying its creditors, including Plaintiff.  
23

24           24. Freddies, under the direction of Defendants Newton and Coon,  
25 transferred assets to third parties with intent to avoid paying its creditors, including  
26 Plaintiff.

COMPLAINT - 4 of 7

(No. \_\_\_\_\_)  
(100044264.docx)

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
1201 PACIFIC AVENUE, SUITE 2100  
POST OFFICE BOX 1157  
TACOMA, WASHINGTON 98401-1157  
(253) 620-6500 • FACSIMILE (253) 620-6565

1 V. FIRST CAUSE OF ACTION  
2 NEWTON LIABILITY FOR FAILURE TO PAY MINIMUM WAGE

3 25. As an officer, vice principal, agent and general manager of Freddie's,  
4 Defendant Newton is personally liable for the willful non-payment of minimum wages  
5 which caused damage to Plaintiff.

6 26. Defendant Newton's willful non-payment of minimum wages is criminal  
7 conduct pursuant to RCW 49.52.050.

8 VI. SECOND CAUSE OF ACTION  
9 NEWTON LIABILITY FOR REBATE OF WAGES PAID

10 27. As an officer, vice principal, agent and general manager of Freddie's,  
11 Defendant Newton is personally liable for the willful collection or rebate of Plaintiff's  
12 earnings, which caused damage to Plaintiff.

13 28. Defendant Newton's collection or rebating of wages is criminal conduct  
14 pursuant to RCW 49.52.050.

15 VII. THIRD CAUSE OF ACTION  
16 UNIFORM FRAUDULENT TRANSFERS ACT

17 29. Defendants transferred or were transferees of obligations incurred with  
18 actual intent to hinder, delay, or defraud Plaintiff-creditor.

19 30. Defendants' conduct constitutes a violation of Washington's Uniform  
20 Fraudulent Transfers Act.

21 31. Defendants' violation of the Washington's Uniform Fraudulent Transfers  
22 Act has damaged Plaintiff.  
23

24 VIII. FOURTH CAUSE OF ACTION  
25 CORPORATE VEIL PIERCING

26 32. The judgment owing to Plaintiff is a liability of Lakeside Casino, LLC.

COMPLAINT - 5 of 7

(No. \_\_\_\_\_)  
[10C044264.docx]

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
1201 PACIFIC AVENUE, SUITE 2100  
POST OFFICE BOX 1157  
TACOMA, WASHINGTON 98401-1157  
(253) 620-6500 • FACSIMILE (253) 620-6565

1 33. Defendants intentionally used Lakeside Casino, LLC and Hana Hou Wailea,  
2 LLC's corporate forms to violate or evade Freddie's duties through fraud,  
3 misrepresentation, or other form of manipulation.

4 34. Defendants are "alter egos" of Lakeside Casino, LLC's corporate form.

5 35. Defendants have "gutted" Lakeside Casino, LLC, leaving the entity  
6 undercapitalized, insolvent, and unable to pay its creditors, including Plaintiff.  
7

8 36. Lakeside Casino, LLC's liability on the judgment in Pierce County Cause  
9 No. 10-2-14125-7 passed through to Defendants pursuant to RCW 23B.08.310 or via  
10 common law principles underlying a corporate "veil piercing" action.

11 37. Defendants' abuse of corporate form has damaged Plaintiff.

12 IX. RELIEF REQUESTED

13 38. Plaintiff requests that judgment be entered against Defendants as  
14 follows:

15 a) Holding Defendants jointly and severally liable for the full judgment  
16 entered against Lakeside Casino, LLC on June 8, 2012 (Pierce County Cause No.  
17 10-2-14125-7), with interest;

18 b) Awarding Plaintiff additional attorneys' fees and costs as allowed by  
19 law;  
20

21 c) Awarding Plaintiff prejudgment and post-judgment interest;  
22  
23  
24  
25  
26

COMPLAINT - 6 of 7  
(No. \_\_\_\_\_)  
[100044264.docx]

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
1201 PACIFIC AVENUE, SUITE 2100  
POST OFFICE BOX 1157  
TACOMA, WASHINGTON 98401-1157  
(253) 620-6500 - FACSIMILE (253) 520-6565

1 d) Awarding Plaintiff any additional or further relief allowed by law or  
2 deemed by the Court as just and equitable, including without limitation those  
3 remedies available pursuant to RCW 19.40.071  
4

5 Dated this 21st day of June, 2012.  
6

7 GORDON THOMAS HONEYWELL LLP

8 By 

9 Stephanie L. Bloomfield, WSBA No. 34208  
10 sbloomfield@gth-law.com  
11 Eric D. Gilman, WSBA No. 41680  
12 egilman@gth-law.com  
13 Attorneys for Plaintiff  
14  
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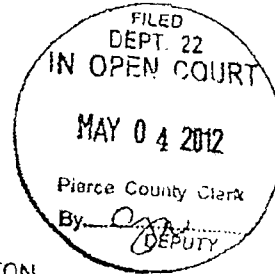
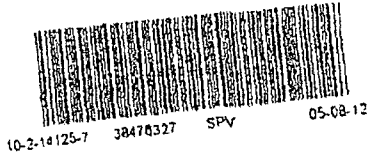
COMPLAINT - 7 of 7

(No. \_\_\_\_\_)  
[100044264.docx]

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
1201 PACIFIC AVENUE, SUITE 2100  
POST OFFICE BOX 1157  
TACOMA, WASHINGTON 98401-1157  
(253) 620-6500 - FACSIMILE (253) 620-6565

# EXHIBIT A

12685 5/28/2012 288117



SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

RUBY JUMAMIL,

Plaintiff,

vs.

LAKESIDE CASINO, L.L.C., a Washington  
limited liability company d/b/a/ FREDDIE'S  
CLUB CASINO OF FIFE,

Defendant.

NO. 10-2-14125-7

SPECIAL VERDICT FORM

We the jury answer the questions submitted by the Court as follows:

QUESTION 1: Did the defendant fail to compensate plaintiff for all hours worked?

ANSWER: yes (Write "yes" or "no")

(INSTRUCTION: If you answered "yes" to Question 1, proceed to Question 2. If you answered "no" to Question 1, proceed to Question 4.)

QUESTION 2: Was the defendant's failure to compensate plaintiff for all hours worked willful?

ANSWER: yes (Write "yes" or "no")

(INSTRUCTION: Proceed to Question 3.)

QUESTION 3: What is the total amount of wages defendant did not pay to the plaintiff?

ANSWER: \$ 288.99

ORIGINAL

QUESTION 4: Did the defendant require plaintiff to rebate wages to the defendant?

ANSWER: yes (Write "yes" or "no")

(INSTRUCTION: If you answered "yes" to Question 4, proceed to Question 5. If you answered "no" to Question 4, proceed to Question 7.)

QUESTION 5: Was the defendant's rebate of plaintiff's wages willful?

ANSWER: yes (Write "yes" or "no")

QUESTION 6: What is the total amount of wages defendant required plaintiff to rebate?

ANSWER: \$ 811.20

QUESTION 7: Did the defendant discharge the plaintiff in violation of public policy?

ANSWER: yes (Write "yes" or "no")

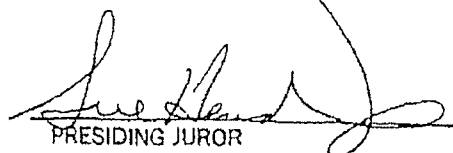
(INSTRUCTION: If you answered "yes" to Question 7, then proceed to Question 8. If you answered "no" to Question 7, then sign and return this verdict form.)

QUESTION 8: What is the total amount of plaintiff's damages proximately caused by defendant's wrongful termination?

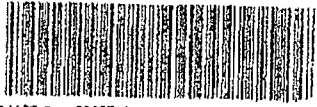
ANSWER:	Past Economic Damages	\$ <u>28,000</u>
	Future Economic Damages	\$ <u>0</u>
	Non-Economic Damages	\$ <u>0</u>
	TOTAL	\$ <u>28,000</u>

Sign and return this verdict form.

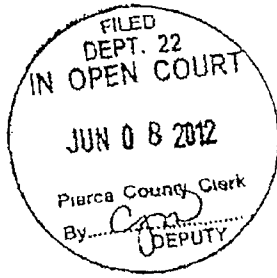
DATE: 5/4/2012

  
PRESIDING JUROR

# EXHIBIT B



10-2-14125-7 38887781 JOV 06-12-12



SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

RUBY JUMAMIL

Plaintiff,

v.

LAKE SIDE CASINO LLC, a Washington Limited  
Liability Corporation, d/b/a FREDDIES CLUB  
CASINO OF FIFE,

Defendant.

NO. 10-2-14125-7

JUDGMENT ON THE VERDICT

ASSIGNED TO THE HONORABLE JOHN R.  
HICKMAN

HEARING DATE: June 8, 2012

JUDGMENT SUMMARY

1. Judgment Creditor: Rubyve Jumamil
2. Attorney for Judgment Creditor: Eric D. Gilman and Stephanie Bloomfield
3. Judgment Debtor: Lakeside Casino, LLC  
d/b/a Freddie's Club Casino of Fife
4. Attorney for Judgment Debtor: Michael E. McAleenan
5. Principal Amount: \$ 30,200.38
6. Attorneys' Fees: \$ 125,000.00
7. Costs: \$ 10,000.00
- TOTAL JUDGMENT \$ 165,000.38

JUDGMENT ON VERDICT - 1 of 3  
(10-2-14125-7)  
(100042731.docx)

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
1201 PACIFIC AVENUE, SUITE 2100  
POST OFFICE BOX 1157  
TACOMA, WASHINGTON 98401-1157  
(253) 620-6500 - FACSIMILE (253) 620-6565

THIS MATTER came on for trial before the Honorable John R. Hickman beginning on April 18, 2012. Plaintiff was represented by Stephanie Bloomfield and Eric D. Gilman. Defendant was represented by Michael E. McAleenan and Russell Knight. The parties presented testimony and submitted evidence. At the conclusion of the trial and after deliberation, the jury returned a verdict in favor of Plaintiff or her Minimum Wage Act claim, RCW 49.46 (\$288.99); Wage Rebating claim, RCW 49.52 (\$811.20); and wrongful discharge claim (\$28,000) on May 4, 2012. Because of the finding of "willfulness" on the wage withholding and wage rebating Plaintiff is entitled to double damages pursuant to statute.

The following summarizes the underlying items included in the judgment on the jury's verdict.

Willfully Withheld Wages	288.99
Double Damages per RCW 49.	288.99
Willfully Rebated Wages	811.20
Double Damages per RCW 49.	811.20
Back Pay	28,000.00
<b>TOTAL JUDGMENT ON VERDICT:</b>	<b>\$30,200.38</b>

Plaintiff has moved for a Judgment on the Verdict and it is hereby ORDERED that judgment is entered in Plaintiff's favor in the total amount of \$30,200.38, as set forth above against Defendant Lakeside Casino, LLC d/b/a Freddie's Club Casino of Fife.

In addition, Plaintiff has moved for entry of judgment of her attorney's fees and costs by separate motion. In accord with this Court's separately entered findings of fact and conclusions of law relating to the award of attorney's fees. Judgment is also entered for attorney's fees and costs in the following amounts:

JUDGMENT ON VERDICT - 2 of 3  
(10-2-14125-7)  
(100042731.docx)

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
1201 PACIFIC AVENUE, SUITE 2100  
POST OFFICE BOX 1157  
TACOMA, WASHINGTON 98401-1157  
(253) 620-6500 • FACSIMILE (253) 620-6565

Attorney's Fees: \$ 125,000

Costs: \$ 10,000

DONE IN OPEN COURT this 8 day of June, 2012.



[Signature]  
THE HON. JOHN R. HICKMAN

Presented by:

GORDON THOMAS HONEYWELL LLP

By Stephanie Bloomfield  
Stephanie Bloomfield, WSBA No. 24251  
sbloomfield@gth-law.com  
Eric D. Gilman, WSBA No. 41680  
egilman@gth-law.com  
Attorneys for Plaintiff

Approved as to form by:

SMITH ALLING, P.S.

By M. McAleenan  
Michael E. McAleenan, WSBA No. 29426  
mmc@smithalling.com  
Russell A. Knight, WSBA No. 40614  
rknight@smithalling.com  
Attorneys for Defendant

JUDGMENT ON VERDICT - 3 of 3  
(10-2-14125-7)  
(100042731.docx)

LAW OFFICES  
GORDON THOMAS HONEYWELL LLP  
1201 PACIFIC AVENUE, SUITE 2100  
POST OFFICE BOX 1157  
TACOMA, WASHINGTON 98401-1157  
(253) 620-6500 - FACSIMILE (253) 620-6565

# **EXHIBIT 3**

August 23 2012 4:01 PM  
Hon. Stephanie A. Arend  
KEVIN STOCK  
COUNTY CLERK  
NO: 12-2-10502-8

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

RUBY JUMAMIL,

Plaintiff,

v.

NOEL COON and JANE DOE COON and  
their marital community; JACK NEWTON  
and BRENDA NEWTON and their marital  
community; SUSAN MUDARRI and JOHN  
DOE MUDARRI and their marital  
community; and HANA HOU WAILEA,  
LLC, a Washington limited corporation,

Defendants.

No. 12-2-10502-8

NOTICE OF TENDER OF WAGES  
ALLEGEDLY DUE

COMES NOW, Michael E. McAleenan of Smith Alling, PS, attorney of record for  
Defendants Jack and Brenda Newton, and hereby provides notice that the alleged unpaid and  
rebated wages Plaintiff claims are owed in the above-captioned matter have been tendered to  
Plaintiff as reflected in the attachments hereto.

DATED THIS this 23rd day of August, 2012.

SMITH ALLING, P.S.

By

M. McAleenan  
Michael E. McAleenan, WSBA #29426  
Attorney for Defendants Newton

NOTICE OF TENDER OF  
WAGES ALLEGEDLY DUE - Page 1

SMITH ALLING  
1102 Broadway Plaza, #400  
Tacoma, Washington 98402  
Tacoma (253) 627-1051  
Facsimile: (253) 627-0123

# SMITH ALLIANCE

ATTORNEYS AT LAW

1102 Broadway, Suite 403, Tacoma, WA 98402  
Tel: (253) 627-1091 | Fax: (253) 627-0123  
[www.smithalliance.com](http://www.smithalliance.com)

Chad E. Ahrens  
Douglas V. Alling  
Gary H. Branfield  
Kelly DeLeat-Maher  
Jordan K. Foster  
Barbara A. Henderson  
Edward G. Hudson  
Russell A. Knight  
Michael E. McAleenan  
Robert L. Michals  
C. Tyler Shillito

July 20, 2012

Ms. Stephanie Bloomfield  
Mr. Eric D. Gilman  
Gordon Thomas Honeywell, PLLC  
P.O. Box 1157  
Tacoma, WA 98401-1157

**RE: Payment of Alleged Wages Due**  
**Jumamil v. Coon and Newton, et al.**  
**Pierce County Superior Court Cause No. 12-2-10502-8**

Dear Counsel:

As you are aware, this office represents Jack Newton and Brenda Newton in the above-referenced lawsuit. In the Complaint, Plaintiff alleges that Jack Newton is liable for willful nonpayment of minimum wage per the jury verdict in Pierce County Superior Court Cause No. 10-2-14125-7 in the amount of \$288.99, and for willful rebating of Ms. Jumamil's wages in the amount of \$311.20. Defendants Newton deny and all liability for such allegations.

Notwithstanding, on behalf of the Newtons, enclosed please find this firm's check #53462 made payable to Ruby Jumamil in the amount of \$2,794.48, representing payment of any wages she claims due, doubling of damages, and 12% interest.

In the event Ms. Jumamil refuses to accept the payment as enclosed herein, I do not see how your client can support a claim that the Newtons willfully refused to pay Ms. Jumamil wages due, or any rebating of the same, due to the fact that no prior demand has been made upon the Newtons other than the filing of this lawsuit.

To the extent Ms. Jumamil refuses to accept the enclosed payment of her alleged wages due, the Newtons offer \$2,794.48 pursuant to RCW 4.84.250 in settlement, inclusive of all attorney fees, costs, and expenses, and as an offer of judgment under CR 68. The CR 68 notice is enclosed herein.

Again, the Newtons dispute the validity, amount, and any liability for Ms. Jumamil's wage claims. Nothing herein should be construed as an admission to the contrary.

2012 JUL 20 PM 4:15

CLERK COURT OF PIERCE COUNTY  
JANICE ROBERTSON, CLERK

SMITH ALLING PS  
TACOMA, WA 98402

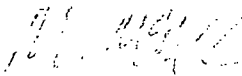
Ms. Stephanie Bloomfield  
Mr. Eric D. Gilman  
July 20, 2012  
Page 2

2012 JUL 20 PM 4:15

Ms. Jumamil is free to cash the enclosed check, but she can no longer say that she has not been paid the wages she alleges are due or owing. In the event Ms. Jumamil has no intention of cashing the enclosed check, please return the check to my office within fourteen days.

Yours truly,


SMITH ALLING, P.S.



Michael E. McAleenan

MMc:jp  
Enclosure  
cc: Client  
Tom Gallagher

SMITH ALLING PS  
GENERAL ACCOUNT  
1102 BROADWAY PLZ STE 403  
TACOMA, WA 98402  
(253) 627-1091

 Columbia Bank  
COLUMBIA STATE BANK  
1102 Broadway Plaza  
Tacoma, WA 98402  
34-827-1251

53462

07/20/12

\*\*\$2,794.48

\*\*\* TWO THOUSAND SEVEN HUNDRED NINETY-FOUR & 48/100 DOLLARS

AMOUNT

PAY  
TO THE  
ORDER  
OF  
Ruby Jumamil

  
AUTHORIZED SIGNATURE

CP 657

CR 68 OFFER OF JUDGMENT

Hon. Stephanie A. Arend

2012 JUL 20 PM 4:15

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

RUBY JUMAMIL,

No. 12-2-10502-8

Plaintiff,

CR 68 OFFER OF JUDGMENT

v.

NOEL COON and JANE DOE COON and  
their marital community; JACK NEWTON  
and BRENDA NEWTON and their marital  
community; SUSAN MUDARRI and JOHN  
DOE MUDARRI and their marital  
community; and HANA HOU WAILEA,  
LLC, a Washington limited corporation,

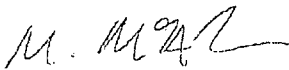
Defendants.

Pursuant to CR 68, Defendants Jack Newton and Brenda Newton hereby offer  
judgment to be entered in favor of Plaintiff and against said Defendants, jointly and severally,  
in the sum of \$2,794.48, inclusive of all costs, expenses, and attorney's fees.

DATED THIS this 20th day of July, 2012.

SMITH ALLING, P.S.

By



Michael E. McAleenan, WSBA #29426  
Attorney for Defendants Newton

CR 68 OFFER OF JUDGMENT -- Page 1

SMITH

ATTORNEYS AT LAW

1102 Broadway Plaza, #403  
Tacoma, Washington 98402  
Tacoma: (253) 627-1091  
Facsimile: (253) 627-0123

# **EXHIBIT 4**



12-2-10502-8 39377175 ORDSMP 10-18-12

Hon. Stephanie A. Arend

FILED  
IN COUNTY CLERK'S OFFICE

AM OCT 18 2012 PM

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY: [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

RUBY JUMAMIL.

Plaintiff.

v.

NOEL COON and JANE DOE COON and  
their marital community; JACK NEWTON  
and BRENDA NEWTON and their marital  
community; SUSAN MUDARRI and JOHN  
DOE MUDARRI and their marital  
community; and HANA HOU WAILLEA,  
LLC, a Washington limited corporation,

Defendants.

No 12-2-10502-8

STIPULATED ORDER DISMISSING  
CLAIMS AGAINST DEFENDANTS JACK  
AND BRENDA NEWTON

COME NOW the parties, by and through their undersigned attorneys of record and  
hereby stipulate that Plaintiff's claims against Defendants Jack Newton and Brenda Newton  
be dismissed with prejudice and without costs.

DATED this 18<sup>th</sup> day of October, 2012

SMITH ALLING, P.S.

GORDON THOMAS HONEYWELL, PLLC

By: [Signature]  
Michael E. McAleenan, WSBA #29426  
Attorneys for Defendants Newton

By: [Signature]  
Eric Gilman, WSBA #41680  
Attorneys for Plaintiff

STIPULATED ORDER DISMISSING  
CLAIMS AGAINST DEFENDANTS  
JACK AND BRENDA NEWTON - Page 1

SMITH ALLING

1102 Broadway Plaza, #403  
Tacoma, Washington 98402  
Tacoma (253) 527-1051  
Facsimile (253) 527-0123

4.

ORDER

Pursuant to the foregoing Stipulation, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff's claims against Defendants

Jack Newton and Brenda Newton are dismissed with prejudice and without costs

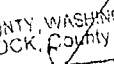
DONE IN OPEN COURT this 18<sup>th</sup> day of October, 2012.

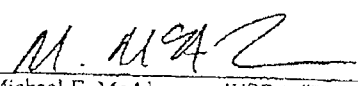
  
JUDGE/COURT COMMISSIONER

Presented by

SMITH ALLING, P S

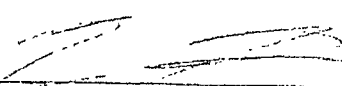
FILED  
IN COUNTY CLERK'S OFFICE

AM OCT 18 2012 PM.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY  DEPUTY

By   
Michael E. McAleenan, WSBA #29426  
Attorneys for Defendants Newton

Approved as to form;  
Notice of presentment waived

GORDON THOMAS HONEYWELL <sup>LLP</sup> PLLC

By   
Eric Gilman, WSBA #41680  
Attorneys for Plaintiff

STIPULATED ORDER DISMISSING  
CLAIMS AGAINST DEFENDANTS  
JACK AND BRENDA NEWTON - Page 2

SMITH ALLING

1102 Broadway Plaza, #103  
Tacoma Washington 98402  
Tacoma, (253) 627-1051  
Facsimile (253) 627-0123

# **EXHIBIT 5**

32901.00001

53462

**SMITH ALLING PS**  
 GENERAL ACCOUNT  
 1102 BROADWAY PLZ STE 403  
 TACOMA, WA 98402  
 (253) 827-1091

**Columbia Bank**  
 COLUMBIA FIRST BANK  
 1102 Broadway Plaza  
 Tacoma, WA 98402

07/20/12

\*\*\$2,794.48

\*\*\* TWO THOUSAND SEVEN HUNDRED NINETY-FOUR & 48/100 DOLLARS

AMOUNT

PAY TO THE ORDER OF Ruby Jumamil

OF

*[Signature]*  
 AUTHORIZED SIGNATURE

Security Features: Details on back

Pay To The Order of  
 Gordon Thomas Howell, LLP

*[Signature]*  
 PAY TO THE ORDER OF  
 COLUMBIA BANK

GORDON THOMAS HOWELL LLP

### DECLARATION OF SERVICE

I hereby certify that I have this 22<sup>nd</sup> day of January, 2013, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

***Counsel for Appellant:***

Ms. Stephanie Bloomfield  
Mr. Eric D. Gilman  
Gordon Thomas Honeywell, PLLC  
1201 Pacific Ave., Suite 2200  
P.O. Box 1157  
Tacoma, WA 98401-1157  
sbloomfield@gth-law.com  
egilman@gth-law.com

☒ Hand Delivery  
☐ U.S. Mail (first-class,  
postage prepaid)  
☐ ABC Legal Messengers  
☐ Facsimile  
☒ Email

***Counsel for Respondents Coon:***

Thomas F. Gallagher  
Watson & Gallagher, P.S.  
3623 South 12<sup>th</sup> Street  
Tacoma, WA 98405  
tom@wglaw.comcastbiz.net

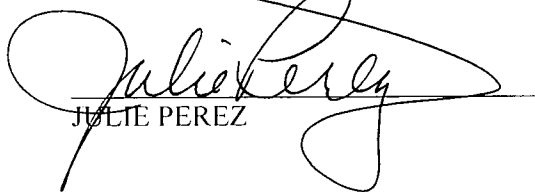
☐ Hand Delivery  
☐ U.S. Mail (first-class,  
postage prepaid)  
☐ ABC Legal Messengers  
☐ Facsimile  
☒ Email:

Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454  
coa2filings@courts.wa.gov

☒ Hand Delivery  
☐ U.S. Mail (first-class,  
postage prepaid)  
☐ ABC Legal Messengers  
☐ Facsimile  
☒ Email

I declare under penalty of perjury under the laws of the State of Washington that the I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22<sup>nd</sup> day of January, 2013, at Tacoma, Washington.

  
JULIE PEREZ